

## **Criminal Procedure in Zimbabwe**

Mr Crozier who is the lecturer in Criminal Procedure at the University of Zimbabwe has compiled a set of notes for undergraduate LL.B students at the university. He has kindly agreed to the publication of these notes on ZIMLII so that these notes can be available for students and other persons who require information on the subject of Criminal Procedure. These notes should be read together with the textbook on *Criminal Procedure in Zimbabwe* by John Reid-Rowland published by the Legal Resources Foundation of Zimbabwe.

# **UNIVERSITY OF ZIMBABWE LL.B. (HONS) PART II CRIMINAL PROCEDURE (LB 201) LECTURE NOTES**

---

## **TABLE OF CONTENTS**

---

1. Introductory Topics .....	11
Definitions of Technical Terms.....	11
What is a Crime? .....	12
Note: Levels of Fines .....	13
The Nature of Criminal Procedure .....	14
Criminal Procedure in its Socio-Political Context .....	14
Crime control versus due process.....	15
Classification according to treatment of victims' rights .....	17
The Declaration of Rights in the Constitution.....	18
Fair trial .....	24
Equal protection of law .....	25
Public trial .....	25
Presence of accused.....	27
Representation of accused .....	27
Presumption of innocence .....	28
Burden of proof: proof beyond reasonable doubt .....	29
The right of [or to] silence: privilege against self-incrimination .....	32
Reasonableness.....	34
Rights and duties: crime control and due process .....	35
Adversarial and inquisitorial systems of criminal procedure .....	36

Criminal procedure as a system.....	38
Remedies .....	38
2. Jurisdiction of the Courts .....	40
Magistrates courts.....	40
Territorial jurisdiction .....	40
Crimes that may be tried in a magistrates court .....	41
Magistrates’ jurisdiction as to punishment.....	41
The High Court.....	44
Original jurisdiction .....	44
Review jurisdiction.....	44
Appellate jurisdiction .....	45
The Supreme Court .....	45
The Constitutional Court .....	45
3. The Police and Their Powers.....	46
Who are the Police?.....	46
Police officers/peace officers .....	46
Interrogation by the Police .....	46
Judges’ Rules.....	48
Taking of bodily samples from persons .....	48
4. Securing the attendance of the accused at his trial .....	50
1. Arrest and Remand .....	50
Arrest without a warrant.....	51
Arrest with warrant.....	55
Use of force in effecting an arrest .....	56
Effect of unlawful arrest.....	59
Taking of fingerprints, etc. ....	59
Records to be kept of arrested persons .....	59
Rights of suspect and his practitioner after arrest .....	60
Remand.....	61
2. Summons .....	65
Issue of summons .....	65
Contents of summons .....	65
Service of summons .....	65
Proof of service of summons if accused fails to appear in court.....	66
3. Written Notice to Appear .....	66
4. Warning to Appear .....	67
5. Extradition.....	67
6. Merits of the different methods of securing attendance of accused .....	67
Arrest and Remand .....	67

Summons .....	68
Written notice to appear .....	69
Warning to appear .....	69
5. Bail Pending Trial .....	70
What is Bail? .....	70
Who May Grant Bail .....	71
Application for Bail.....	71
Principles Governing the Grant of Bail .....	73
Right to bail .....	73
Compelling reasons justifying detention .....	73
Section 117 of the Criminal Procedure and Evidence Act .....	74
Onus of proof.....	75
Methods of Granting Bail.....	76
Deposit of money or property.....	76
Recognizances .....	76
Bail Conditions .....	77
Amount of Bail .....	77
Amendment or Withdrawal of Bail .....	77
Breach of Conditions of Bail.....	77
Appeal against Grant or Refusal of Bail.....	78
Appeal by accused against decision of magistrate .....	78
Appeal by accused against decision of judge .....	79
Appeal by Prosecutor-General against bail decisions .....	79
Bail Granted by Police .....	80
6. Search and Seizure .....	82
Search of a Person on Arrest .....	82
Search With and Without Warrant .....	82
Search and seizure of articles with warrant.....	82
Search without warrant.....	85
Effect of Unlawful Search.....	86
Subsequent Disposal of Seized Articles .....	87
7. Judicial Officers .....	89
Judicial officer's conduct .....	89
Questioning of witnesses .....	89
Calling of evidence.....	90
Assistance to undefended accused persons .....	90
Protecting witnesses .....	91
Recusal of judicial officer .....	91
Incapacity of judge or magistrate .....	93

8. Prosecutors .....	94
Public prosecutions (“prosecutions at the public instance”) .....	94
The National Prosecuting Authority and the Prosecutor-General .....	94
Other law officers .....	95
Independence of prosecutors .....	95
Duties of prosecutors .....	96
The decision to prosecute .....	97
Private prosecutions .....	99
Who may prosecute .....	99
Procedure for instituting private prosecution .....	99
9. Prosecution of Companies and Associations.....	102
Criminal liability of corporate bodies and associations .....	102
Charging corporate bodies and associations .....	103
Evidence and presumptions.....	103
Proof of a body’s corporate nature .....	103
Presumptions .....	103
10. Mentally Disordered Accused Persons.....	105
Introduction .....	105
Police powers on arrest of mentally disordered or intellectually handicapped person.....	105
Mental illness disclosed before trial .....	106
Mental illness disclosed during trial.....	107
1. Mental disorder rendering accused unfit to stand trial .....	107
2. Mental disorder not rendering accused unfit to stand trial .....	108
Recovery of person found unfit to plead or stand trial.....	108
Mental illness becoming apparent after conviction.....	108
Accused person who was mentally disordered when the crime was committed .....	109
Requirements for special verdict .....	110
Evidence required for special verdict .....	110
What constitutes mental disorder or intellectual handicap.....	111
Deaf mutes.....	111
11. Charges and Indictments .....	113
Nature of charges.....	113
Choice of crime to charge.....	113
Essentials of charge .....	114
Contents of charge .....	114
1. Particulars of the accused .....	114
2. Time and place of crime .....	115

3. Essentials of the crime.....	115
Particular crimes.....	116
Crimes requiring particular intent .....	116
Theft .....	116
Section 146(2) .....	116
Joinder of counts .....	117
Alternative charges.....	118
Further particulars .....	118
Defects in charges .....	118
Failure to allege anything which it is unnecessary to prove.....	118
Incorrect designation of a person mentioned in the charge.....	119
Omission to state the time of the crime .....	119
Wrong date specified in the charge, or no time mentioned.....	119
Want of or imperfection in the addition of an accused or other person .....	119
Failure to mention the value or price of anything, or the amount of damage etc. ....	119
Defect in charge cured by evidence.....	120
Amendment of charge .....	120
When amendment is not allowed .....	120
Amendment on appeal.....	120
Splitting of charges.....	121
What is splitting of charges? .....	121
Test for splitting of charges.....	122
Withdrawal of charges.....	123
Withdrawal before plea .....	123
Withdrawal after plea .....	123
12. Joinder and Separation of Trials.....	124
Joinder of accused .....	124
Separation of trials.....	124
13. Extra-Curial Statements .....	127
What is an extra-curial statement? .....	127
Types of extra-curial statements.....	127
Admissibility of extra-curial statements.....	127
General rule .....	127
Warning and caution .....	128
Indications .....	129
Failure to mention relevant facts .....	130
Production of extra-curial statements.....	130
Tendering of unconfirmed extra-curial statements.....	130

Production in evidence of confirmed extra-curial statements .....	131
Deletion of prejudicial matter from extra-curial statements.....	133
Objections to our law vis-à-vis extra-curial statements .....	134
Conviction of accused person on proof of confession .....	135
14. Witnesses.....	136
Securing the presence of witnesses .....	136
Warning .....	136
Subpoena .....	136
Exclusion of witnesses from courtroom .....	137
Hostile witnesses .....	137
Discrediting or impeaching witnesses .....	137
Protection of vulnerable witnesses .....	138
Measures that can be taken to protect vulnerable witnesses .....	138
15. Preliminaries to the Trial .....	140
Date of trial.....	140
High Court.....	140
Magistrates court .....	140
Postponement or adjournment of trial .....	140
Bringing the accused to trial in the High Court.....	140
16. Outline of Trial Procedure from Plea to Sentence .....	142
Introduction .....	142
Explanation of Accused Person's Rights .....	142
Arraignment.....	142
Plea of guilty .....	142
Plea of not guilty .....	142
Outline of State and Defence Cases .....	143
High Court.....	143
Magistrates court .....	143
The State Case .....	143
Discharge at End of State Case .....	143
Defence Case .....	144
Verdict .....	144
Sentence.....	144
17. Pleas.....	145
Arraignment.....	145
Objections to charge .....	145
Exceptions and motions to quash .....	145
Notice to be given before objecting to charge, and for certain pleas .....	146
Particular pleas .....	146

Not guilty.....	146
Guilty.....	146
Autrefois Acquit or Autrefois Convict.....	151
Absence of jurisdiction.....	153
Presidential pardon.....	153
Plea that accused was given immunity after giving evidence as accomplice.....	153
Permanent stay of prosecution.....	154
Absence of title by the prosecutor.....	154
Lis pendens.....	154
[Truth of defamatory matter].....	154
Combination of pleas.....	154
Notice of pleas.....	154
Alteration of plea.....	155
Accused entitled to verdict after plea.....	155
18. Outline of State and defence cases.....	157
High Court.....	157
Magistrates court.....	157
19. Prosecution case.....	159
Evidence for the prosecution.....	159
Cross-examination and re-examination of State witnesses.....	160
Close of State case.....	160
Discharge of accused at close of State case.....	160
When application for discharge may be made.....	161
When discharge should be ordered.....	161
20. Defence case.....	164
Informing the accused of his rights.....	164
Defence evidence.....	164
Questioning of accused.....	165
21. Procedure After Close of Evidence.....	166
Addresses by the parties.....	166
Record of trial.....	166
Stopping of trial before verdict.....	166
22. Verdict.....	168
Verdicts and judgments.....	168
When judgment should be given.....	168
Reasons for judgment.....	168
Possible verdicts.....	169
Acquittal.....	169
Conviction.....	169

Alternative counts.....	169
Permissible [competent] verdicts .....	169
23. Sentence.....	170
Pre-sentence investigation.....	170
Proof of previous convictions.....	170
Evidence on sentence .....	171
Order in which evidence is presented or addresses are made .....	172
Onus of proof.....	173
Passing of sentence.....	173
Sentence to be passed in open court.....	173
By whom sentence may be passed .....	174
Correction of sentence.....	174
Sentencing for untried crimes.....	175
Adjournment of case where sentence exceeding magistrate’s jurisdiction is justified.....	175
Penal provisions .....	176
Forms of sentence.....	176
General .....	176
Death sentence.....	177
Imprisonment.....	177
Fine.....	180
Community service.....	181
Corporal punishment .....	184
Putting the offender under recognizances (binding a person over to keep the peace).....	184
Caution and discharge .....	185
Mandatory minimum sentences.....	185
Special circumstances or reasons .....	185
Multiple counts.....	186
Cumulative or consecutive sentences.....	186
Sentencing guidelines.....	187
Suspension or postponement of sentence.....	188
General considerations as to suspension or postponement .....	188
Conditions of suspension or postponement.....	189
Length of suspended sentence and period of suspension .....	190
Bringing suspended sentence into effect .....	190
Reasons for Sentence.....	192
Factors affecting sentence .....	192
General approach to sentence.....	192

Specific factors .....	<b>Error! Bookmark not defined.</b>
Costs .....	198
Compensation for victims .....	198
Forfeiture of items .....	199
24. Scrutiny and Review .....	201
Scrutiny by regional magistrate .....	201
Automatic review by High Court .....	201
Purpose of review .....	202
Powers of judge on review .....	202
Real and substantial justice .....	203
Non-automatic Review .....	204
Incomplete proceedings.....	205
Bail pending review.....	205
25. Appeals.....	206
Distinction Between Appeal and Review.....	206
Appeal Courts.....	207
Appeals by Accused .....	207
From High Court .....	207
From magistrates courts .....	208
From other courts .....	208
Interlocutory rulings .....	208
Bail pending appeal .....	209
Application for bail pending appeal .....	209
Principles governing bail pending appeal.....	209
Appeals by Prosecutor-General.....	210
Appeal on point of law or against acquittal or against discharge at end of State case .....	210
Appeal against sentence .....	211
Appeal against interlocutory rulings .....	211
Application for Leave to Appeal .....	211
Notice of Appeal .....	212
Time-limits for noting appeals .....	212
Appeals from magistrates courts .....	212
Appeals from High Court.....	212
Extension of time.....	213
Grounds of appeal .....	213
Magistrate's reasons .....	213
Procedure where judgment not available .....	214
Payment for record .....	214

Appeals in person .....	214
Representation of appellant and renunciation of agency.....	214
Set-down.....	215
Appeals by Prosecutor-General .....	215
Appeals by convicted persons .....	215
Heads of argument.....	215
Court’s powers on appeal .....	215
Concession by Prosecutor-General .....	215
Hearing of evidence.....	216
Quashing of conviction .....	216
Alteration of conviction.....	216
Alteration of sentence.....	217
Statement of appropriate sentence.....	217
Statement of appropriate verdict or quashing of acquittal .....	217
Restitution, compensation, etc.....	217
Remittal for trial de novo .....	218
Dismissal of appeal .....	218
Execution of Sentence Pending Appeal .....	218

# 1. INTRODUCTORY TOPICS

## Definitions of Technical Terms

Criminal procedure, like all other branches of the law, has technical terms which students need to understand. The following are some of the terms used in these notes, with explanations of what they mean:

**Admit in evidence:** This occurs when a court allows something to be produced in evidence: the court is said to “admit the thing in evidence”.

**Arraignment:** The stage of a criminal at which the accused person is called upon to plead to the charge.

**Bail:** The release of a prisoner from custody upon his entering into a written undertaking (a recognizance) to appear in court at a later date and to comply with other conditions that a court may impose upon him.

**Charge:** A statement of the crime (or one of the crimes, where the accused person is charged with committing several crimes) which the accused person is alleged to have committed. It is set out in an indictment (in the case of the High Court) or a charge sheet or summons (in a magistrates court).

**Charge sheet:** A document which, in a trial in a magistrates court, sets out the crime or crimes which the accused person is alleged to have committed.

**Court:** In the context of criminal procedure, this means the Supreme Court, the High Court or a magistrates court. More loosely, the word “court” is also used to mean the judge or magistrate who presides over the court.

**Court of first instance:** The court that held the trial or first dealt with a particular matter. Also called “the court *a quo*”.

**Crime (or criminal offence):** An act or omission punishable by the State. See the next section for more detail.

**Defence case:** The case for the accused, i.e. the evidence given for the accused person.

**Extra-curial statement:** A statement made by an accused person outside the court.

**Indictment:** A document which, in a trial in the High Court, sets out the crime or crimes which the accused person is alleged to have committed.

**Judgment:** A statement by a judge or magistrate of the reasons for his or her decision.

**Judicial officer:** A judge or magistrate. A prosecutor is not a judicial officer.

**Jurisdiction:** The power of a court to deal with a criminal case. The court’s jurisdiction may be limited in regard to area – e.g. a magistrate’s jurisdiction may be limited to a particular province – or it may be limited in other ways such as the crimes which a court can deal with (magistrates courts have no jurisdiction to try crimes of murder) or in regard to punishment (e.g. ordinary magistrates cannot impose more than four years’ imprisonment in most cases).

**Leading question:** A question that suggests the answer which the questioner wants the witness to give. For example the question: “Did you see the accused stab the deceased?” suggests that the witness is supposed to say that the accused stabbed the deceased. To get the witness to say what he saw without asking a leading question, the questioner should ask: “What did you see?”

**Legally represented:** An accused person is legally represented if he is represented in court by a legal practitioner.

**Offence:** Another word for a crime.

**Original jurisdiction:** The power of a court to hold a trial or decide a case otherwise than on appeal or review.

**Plea:** This is the accused person's response to the charge, i.e. his answer to the question: "How do you plead, guilty or not guilty?".

**Produce:** A witness "produces" a document or other thing as evidence in a criminal trial by identifying the thing and, in the case of a document, reading it out, and handing it in to the court.

**Quash:** To set aside or nullify.

**Recognizance:** In the context of bail, it means a written undertaking whereby a person binds himself to appear in court on a particular date, and to comply with such other conditions as a court may impose.

**Recuse:** When a judge or magistrate withdraws from a case, he or she is said to recuse himself or herself.

**Re-examination:** Asking questions of one's witness after the witness has been cross-examined.

**Remand:** An accused person or suspect is remanded when a court orders him to appear in court at a later date. A person may be remanded in custody (i.e. he is kept in prison until his next appearance in court) or out of custody (i.e. he is not kept in prison, though the court may impose restrictions on his movements).

**Sentence:** The punishment imposed by a court on a person convicted of a crime.

**State:** Strictly this means Zimbabwe. Public prosecutions are brought in the name of "the State", i.e. on behalf of society as a whole. Very often, though, the word "State" is used more loosely to mean the prosecutor or the prosecution, as in "the State leads its evidence" or "the State case".

**Subpoena:** A document ordering a person to appear in court as a witness on a date and at a time specified in the document.

**Summary trial:** In the context of magistrates courts, a trial before a magistrate where there has not been a previous hearing of the evidence before another magistrate. The vast majority of trials in magistrates courts are summary trials.

**Summons:** A document ordering a person to appear in a magistrates court to stand trial on a charge specified in the document. Note that the plural of summons is "summonses".

**Trial *de novo*:** A new trial.

**Trial *in camera*:** A trial is held *in camera* when the public is excluded from the courtroom. The phrase "*in camera*" is Latin for "in the room".

**Verdict:** The decision, given by the judge or magistrate at the end of a trial, as to whether the accused person is guilty or not guilty.

## What is a Crime?

In our law the terms "crime", "criminal offence" and "offence" are used interchangeably without distinction. They all mean the same thing. The Constitution uses the word "of-

fence”, which it defines rather unhelpfully as meaning “a criminal offence”.<sup>1</sup> The Criminal Procedure and Evidence Act [*Chapter 9:07*] uses “offence” for the most part, though some sections refer to crimes.<sup>2</sup> The Criminal Law Code, on the other hand, talks of “crime” and defines it as:

“any conduct punishable by this Code or as a criminal offence in any other enactment”.<sup>3</sup>

Throughout these notes, for the sake of consistency, the word “crime” is used.

Because of the great variety of crimes in our law and the different purposes which the criminal law is intended to achieve, one cannot define the concept of crime by reference to its content.<sup>4</sup> Very often the same conduct constitutes both a crime and a delict. For example, hitting a person without lawful cause is a crime – an assault – and also gives rise to a delictual claim for damages. As one learned author pointed out:

“A delict is not a distinct factual concept; it is merely a wrong regarded from the individual’s point of view and in the light of procedure. When the State assumes the right to pursue a wrong, to exact punishment and so effect atonement, we call the proceedings criminal and the wrong, regarded from this point of view, a crime.”<sup>5</sup>

Rather than trying to define the nature of a crime by reference to its content, it is better to define it by reference to its legal consequences, to the fact that the State assumes the right to punish people who commit crimes. Hence the definition in an old textbook, Gardiner & Lansdown *South African Criminal Law and Procedure* 6th ed vol 1 page 1:

“A crime is a violation of the law for which the State may exact punishment.”

The same idea finds expression in section 2 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which defines “offence” – i.e. crime – as “an act or omission punishable by law.”

Probably that is the best one can do by way of definition.

### **Note: Levels of Fines**

Statutes that lay down fines as penalties for crimes no longer specify the fines as amounts in dollars; instead they express them as “levels” on a Standard Scale of Fines. To take a random example, section 183 of the Criminal Law Code states that anyone guilty of perjury is liable to “a fine not exceeding level ten or to imprisonment for a period not exceeding five years or both”.

Before 2001 fines were expressed as monetary amounts, but inflation (later increasing to hyperinflation) reduced the real value of these amounts so that statutes had to be amended constantly in order to keep fines realistic. Section 280 of the Criminal Law Code now provides that fines are to be expressed as levels on the Standard Scale of Fines set out in the First Schedule to the Code. According to this Standard Scale, a level 1 fine is a fine of US \$20, a level 2 fine is \$30, a level 3 fine is \$60, and so on up to level 14, which is \$10 000. The monetary amounts specified in the Standard Scale can be amended by the Minister of Justice through a statutory instrument, which is a much quicker process than amending the individual fines in each Act of Parliament. So if, for example, the Minister

---

<sup>1</sup> In section 332.

<sup>2</sup> For example, sections 62A and 258A.

<sup>3</sup> Section 2(1) of the Code.

<sup>4</sup> See the discussion in Burchell & Hunt *S. African Criminal Law and Procedure* vol 1 (2nd ed) pages 82 ff.

<sup>5</sup> Van den Heever *Aquilian Damages in South African Law* vol 1 (1944) page 2, cited in Burchell & Hunt, *South African Criminal Law and Procedure* vol 1 (2nd ed) page 86.

publishes a statutory instrument stating that level 1 fines will be increased to \$30, the amendment will automatically increase the amounts in every statute that provides for a fine of level 1 to be imposed.

The most recent amendments to the Standard Scale of Fines have not in fact been made by the Minister, but instead have been made through the Finance Acts of 2009, 2017 and 2019.<sup>6</sup>

## **The Nature of Criminal Procedure**

The rules of criminal procedure supply the mechanism by which the criminal law is put into practice. It is part of our adjectival, as opposed to substantive, law.

*Substantive law* determines the rights and duties of individuals and the State. Criminal law, for example, lays down the elements of crimes such as theft, fraud and murder.

*Adjectival or procedural law*, on the other hand, lays down the measures necessary to enforce the substantive law. Criminal law would be ineffective if there were no rules for bringing criminals to trial and stating how trials are to be conducted. The law of criminal procedure supplies those rules.

The rules of criminal procedure cover the structure and powers of the courts and of the prosecution, the rights and disabilities of suspects and accused persons, the powers of the police, pre-trial procedure, detention, bail, charges, the conduct of trials, verdicts, sentencing, appeals and reviews and the exercise of the prerogatives of pardon and mercy.

There is a clear interaction between the rules of criminal procedure and the rules of evidence: failure to comply with procedural rules may render evidence inadmissible. There is also an interaction between rules of criminal procedure and the rules of substantive criminal law. For example, if someone enters another person's home and searches it, that amounts to an invasion of privacy and an *injuria* under the common law. But if the search was carried out under a valid search warrant issued under the Criminal Procedure and Evidence Act [*Chapter 9:07*], then the search is legally justified and the person whose privacy was breached has no right of action.

The rules of criminal procedure are vitally important to society as a whole:

“[Penal law] is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.”<sup>7</sup>

## **Criminal Procedure in its Socio-Political Context<sup>8</sup>**

The rules of criminal procedure should not be viewed in isolation. If we are to understand the scope and purpose of the rules we must look at them in their constitutional and socio-political context.

---

<sup>6</sup> Act 3 of 2009, section 35 of Act 2 of 2017 and section 27 of Act No. 1 of 2019.

<sup>7</sup> Herbert Wechsler, *The Challenge of a Model Penal Code*, 1952 Harvard Law Review page 1097 at 1098, quoted in Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 3.

<sup>8</sup> What follows is largely based on the discussion in Chapter 1 of Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed.

## ***Crime control versus due process***

The rules of criminal procedure have been developed through a balancing of values, which are embodied in what are called the Crime Control Model and the Due Process Model. These two models were put forward by an American professor, Herbert L. Packer, in a book *The Limits of the Criminal Sanction* (1968) Stanford University Press. He put them forward as abstract theoretical models which did not conform to reality (no modern State adopts either of them completely) but which illustrate the opposing values which have to be balanced by a practical criminal justice system.

It is important to remember that he used these two models — crime control and due process — in order to analyse the different values inherent in the legal system of the United States. Hence both his models postulate respect for the U.S. Constitution: the crime control model would acknowledge the right against self-incrimination<sup>9</sup>, for example, but would try to limit that right as far as was legally possible; the due process model, on the other hand, would give the right its broadest effect. He did not envisage the crime control model descending to the levels of crime control in a brutal dictatorship where, for example, accused persons might be tortured into confessing their crimes.

Hence too there is a considerable amount of common ground between his two models. Both models accept that:

- Crimes must be clearly defined.
- When there is reasonable and probable cause for prosecuting a case, then it should generally be prosecuted. Police and prosecutors, in other words, do not have a general “dispensing power” allowing them to absolve criminals of their crimes.
- There must be at least some degree of scrutiny and control over the activities of law enforcement agencies. They cannot be given an entirely free hand.
- Accused persons must have an opportunity to require the State to prove their guilt before an independent court.

### **The crime control model**

The following assertions are the key concerns of the crime control model:

1. The repression of criminal conduct is by far the most important function of criminal justice. If law enforcement fails to bring criminal conduct under tight control it will lead to the breakdown of law and order and hence to the disappearance of an important condition of human freedom. Criminal process is a guarantor of social freedom.
2. Criminal justice should concentrate on vindicating victims’ rights rather than on protecting the rights of suspects or accused persons.
3. Police powers should be expanded to make it easier to investigate, arrest, search, seize, and convict.
4. Legal technicalities that hamper the police should be eliminated.
5. The criminal justice process should facilitate the rapid progress of criminal cases towards their determination.
6. If the police make an arrest and the State brings criminal charges against him, the accused should be presumed guilty because the fact-finding of police and prosecutors is highly reliable.

---

<sup>9</sup> Conferred by the Fifth Amendment of the US Constitution.

7. The main objective of the criminal justice process should be to discover the truth or to establish the factual guilt of the accused.

### The due process model

In contrast, the key values of the due process model may be expressed as follows:

1. The most important function of criminal justice should be to provide due process, or fundamental fairness under the law.
2. Criminal justice should concentrate on the rights of suspects and accused persons, not victims' rights, because the Declaration of Rights expressly provides for the protection of the rights of suspects and accused persons.
3. Police powers should be limited to prevent official oppression of the individual.
4. Constitutional rights are not mere technicalities; the police and other State officers should be held accountable to rules, procedures, and guidelines to ensure fairness and consistency in the justice process.
5. The criminal justice process should look like an obstacle course, consisting of a series of impediments that take the form of procedural safeguards serving as much to protect the factually innocent as to convict the factually guilty.
6. The conviction of a person of a crime should not be based solely on the evidence; a person should be found guilty only if the State follows legal procedures in the gathering and presentation of that evidence.

### Comparison of the two models

As Prof Packer pointed out, neither model has been or should be adopted in its entirety. If the law enforcement authorities were given absolute powers to suppress crime, we should be living in a tyranny; on the other hand, if all the rights of the individual were to be regarded as absolute and inviolable, society would degenerate into anarchy and chaos.

Comparing the two models requires us to make a value judgment. The crime control model reflects conservative values, while the due process model reflects liberal values. The current political climate determines which model shapes criminal justice policy at a specific time. During the politically liberal 1960s, the principles and policies of due process predominated in criminal justice, at least in the West. From the mid 1970s to the present, and particularly after the rise of international terrorism, conservatism has held sway and conservatives have formulated criminal justice policies favouring the crime control model. In Zimbabwe, on the other hand, the enactment of the new constitution, with its emphasis on the rights of suspects and accused persons, may have nudged the balance away from the crime control model and towards the due process model. The balance is never static; it oscillates between the two models as the attitudes of society change.

A fair and effective system of criminal justice must balance the following interests:

1. It must allow criminals to be dealt with effectively, but at the same time must recognise that innocent people are often drawn into the system, particularly at the pre-trial stages when the police are conducting investigations.
2. The liberty of innocent people must not be sacrificed in the interests of crime control, but it must also be recognised that the more safeguards there are against the infringement of innocent people's rights the greater the risk of guilty people escaping conviction and punishment.
3. Law enforcement authorities must be given powers to combat crime (e.g. they must be given powers to arrest people and to search for and seize property which is involved in

crime) but safeguards must be put in place to prevent the abuse of those powers (e.g. there must be rules requiring arrested people to be brought before a court without delay).

4. The rights of victims of crime must be taken into account, as well as those of accused persons.
5. Whether illegally-obtained evidence should be produced in court involves striking a balance. On the one hand, the evidence may be true, and not to produce it in court may mean that a guilty person goes free. On the other hand, its production in court may violate fundamental values of society and encourage law enforcement authorities to break the law. For example, a confession obtained by torturing a suspect may be true, but to allow it to be produced in court would outrage most people and would encourage the use of torture by the police.

The need for a proper balance between crime control and due process was expressed very eloquently by McNally JA in *S v Matare* 1993 (2) ZLR 88 (S) at 102:

“The law of criminal procedure in any country is a compromise between two conflicting objectives. The one is to ensure that criminals are brought to justice quickly and effectively. The other is to ensure that innocent people caught up in the criminal process are not wrongly convicted.

Sadly it is not possible to reach perfection. There will always be cases where criminals go unpunished and there will sometimes be cases where innocent people are punished. Procedural law is deliberately slanted to protect accused persons. The horror of punishing one person unjustly for a crime he did not commit outweighs the frustration of seeing ten men go free when they are in fact guilty.

There is another consideration. A police force unrestricted by laws and rules and regulations can easily become a terror squad, whose sole object is to stop crime and produce a suspect who confesses. Good men in the force will be brushed aside. Those who can achieve confessions by torture, ill-treatment and blackmail will rise to the top.

There is an opposite evil. A police force tied hand and foot by regulations becomes frustrated. Corrupt lawyers and clever criminals treat the police with scorn. The result ... is not acceptable. The law enforcement agencies become vigilantes, dealing out their own justice. Criminals who cannot be convicted are ‘shot while trying to evade arrest’.

So, if we go too far either way, the result is unacceptable. We have to strike a balance.”

### ***Classification according to treatment of victims’ rights***

Apart from the crime-control and due-process models, a criminal justice system can be classified by the way in which it regards the rights of victims of crime. A punitive model of victims’ rights emphasises the importance of punishment, and the need for the rights of victims to be considered as well as the rights of the convicted person when assessing punishment. A non-punitive model of victims’ rights stresses crime prevention and restorative justice; it seeks to avoid formal criminal sanctions and resolve disputes arising from criminal conduct by involving offenders, victims and members of the community in trying to restore the position which existed before the crimes were committed. Requiring convicted persons to make restitution to their victims, or to perform community service instead of undergoing a sentence of imprisonment, may be regarded as examples of this. Restorative justice has a particular role to play in rehabilitating youthful criminals and dealing with less serious types of crime.

If a criminal justice system is to keep its legitimacy in the eyes of members of society, it must pay due regard to the rights of victims of crime. It must try to protect victims from being traumatised, not only by the crimes committed against them, but also by the process-

es of investigating the crimes and prosecuting the offenders. Victim-friendly courts, for example, are a way of protecting vulnerable victims from the strains of giving evidence in criminal trials.

### ***The Declaration of Rights in the Constitution***

The Declaration of Rights protects most of the fundamental human rights and freedoms that are internationally recognised, but allows limits to be placed on some of them. There must be some limits or qualifications on fundamental rights and freedoms if society is to function at all, because a society whose members had unlimited rights and no obligations could not exist in practice. In the context of criminal procedure, some individual rights must be limited to give law enforcement agencies of the State the powers they need to control crime and prevent disorder. But, as pointed out earlier, the limits cannot go too far.

Section 86 of the constitution therefore allows the rights to be limited:

- All the rights must be exercised reasonably and with due regard to other people's rights.
- Rights can be limited by a law of general application, to the extent that the limitation is fair, reasonable, necessary<sup>10</sup> and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. A law cannot, however, limit the following rights:
  - The right to life, except to the extent that a law may authorise the death penalty to be imposed for murder committed in aggravating circumstances.
  - The right to human dignity.<sup>11</sup>
  - The right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.
  - The right not to be placed in slavery or servitude.
  - The right to a fair trial.
  - The right to obtain an order of *habeas corpus* to secure the release of an illegally-detained person.

In so far as they relate to criminal procedure, the principal rights and freedoms set out in the Declaration of Rights, and the specific limitations on them, are as follows:

#### **The right to life (section 48)**

Everyone has the right to life.

##### *Limits:*

- The death sentence may be imposed, but only in the following circumstances:
  - It may be imposed only on men who are between the ages of 21 and 70 and who have been convicted of “murder committed in aggravating circumstances. The term “aggravating circumstances” is not defined and the constitution-makers presumably intended its meaning to be worked out by the High Court and the Supreme Court on a case-by-case basis, in much the same way that the term “extenuating circumstances” under the previous law was developed.

---

<sup>10</sup> Note that the word “necessary” is not included in the equivalent section (section 36) of the South African constitution, though it did appear in that country's interim constitution of 1994

<sup>11</sup> The meaning of “human dignity” and its importance were discussed by Malaba CJ in *S v Chokuramba* CCZ-10-2019.

- The court must have a discretion to impose the death penalty, so a law cannot make it a mandatory penalty.
- It may be carried only in accordance with a final judgment of a competent court. What this means is that it cannot be carried out until the sentenced person has exercised his right to appeal against the conviction and sentence under section 70(5) of the Constitution.
- A person who is sentenced to death must have a right to ask the President for a pardon or commutation (i.e. alteration) of the penalty.
- Further restrictions on the death penalty can be inferred from other provisions of the Declaration of Rights:
  - The way in which it is carried out must not violate the sentenced person's inherent human dignity, protected by section 51 of the Constitution.
  - The way it is carried out must not amount to torture or to cruel, inhuman or degrading treatment or punishment in contravention of section 53. The old Constitution contained a provision (section 15(4)) to the effect that execution by hanging did not amount to inhuman or degrading punishment, but there is no such provision in the present Constitution. Hence a court could decide that hanging is unconstitutional on the ground that it amounts to torture or to cruel, inhuman or degrading punishment.<sup>12</sup>
  - There must not be an excessive delay between the imposition of the sentence and its execution, because that amounts to inhuman or degrading treatment. There is no provision in the present Constitution equivalent to section 15(5) of the previous Constitution, which stated that delay in the execution of a sentence could not be regarded as inhuman or degrading treatment. Section 15(5) was inserted to nullify two judgments<sup>13</sup> of the Supreme Court which held that undue delay could amount to such treatment, and if it did would preclude the execution of the death sentence. In the absence of an equivalent to section 15(5) in the present Constitution, the two judgments are persuasive.
- There is no specific provision equivalent to section 12(2)(b) of the old Constitution, which allowed suspects to be killed in order to stop them escaping arrest. Hence the power of the police to use deadly force in order to effect an arrest must be regarded as severely limited, if it exists at all. And in this regard it must be remembered that under section 86 of the constitution a law cannot limit the right to life.

#### The right to personal liberty and the rights of arrested and detained persons (secs 49 & 50)

Under section 49 everyone has a right to personal liberty, including the rights not to be detained without trial and not to be deprived of liberty arbitrarily<sup>14</sup> or without just cause.

---

<sup>12</sup> In *S v Makwanyane & Anor* 1995 (3) SA 391 (CC), the South African Constitutional Court concluded that the death penalty *per se* amounted to such punishment.

<sup>13</sup> *Catholic Commission for Justice & Peace in Zimbabwe v Attorney-General, Zimbabwe, & Ors* 1993 (1) ZLR 242 (S) and *Woods & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1993 (2) ZLR 443 (S).

<sup>14</sup> Arbitrary is defined in the Concise Oxford Dictionary as "1 based on or derived from uninformed opinion or random choice; capricious. 2 despotic." In *Pharmaceutical Manufacturers Association of S.A. & Anor: in*

This right is amplified, in relation to persons who have been arrested and detained, by section 50:

- Anyone who is arrested:
  - must be informed at the time of arrest<sup>15</sup> why they are being arrested;
  - must be allowed, without delay and at State expense, to contact anyone of their choice, including a lawyer or relative;
  - must be allowed, without delay but at their own expense, to consult in private with their lawyer or medical practitioner;
  - must be informed promptly of these rights;
  - must be treated humanely and with respect for their dignity;
  - must be released pending a charge or trial — i.e. they must be granted bail — unless there are compelling reasons justifying their continued detention<sup>16</sup>;
  - must be allowed to challenge in court the lawfulness of their arrest.
- Anyone who is detained:
  - must be allowed, at their own expense, to consult their lawyer;
  - must be allowed to contact and be visited by their lawyer, doctor, priest, relatives and (subject to reasonable security conditions) by anyone else of their choice.
- Anyone who is arrested or detained on a criminal charge must be brought before a court as soon as possible and in any event within 48 hours, and must be released after 48 hours unless their detention has been extended by a competent court.
- At their first court appearance, a person who has been arrested or detained on a criminal charge must be charged or released or, if the court decides they must continue in detention, must be told why they are to be detained.
- Anyone arrested or detained for an alleged crime has the right to remain silent and to be told that they have this right and of the consequences of remaining silent or of speaking.
- A person who has been detained for an alleged crime must be tried within a reasonable time or else released from detention, whether on bail or otherwise (Note that, according to article 9.3 of the International Convention of Civil and Political Rights, “It shall not be the general rule that persons awaiting trial shall be detained in custody”).

An arrest or detention is rendered illegal if the conditions set out in section 50 are not complied with, and the arrested or detained person is entitled to compensation.

---

*re Ex parte President of R.S.A. & Ors* 2000 (2) SA 674 (CC) at para 85, the South African Constitutional Court held: “It is a requirement of the rule of law that the exercise of public power ... should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.”

<sup>15</sup> This is more stringent than section 13(4) of the Lancaster House constitution, which required them to be informed “as soon as reasonably practicable”, i.e. after the arrest.

<sup>16</sup> Note that this is more stringent than the South African constitution, which allows bail to be refused “if the interests of justice permit”.

It may be noted that some of the rights contained in article 10 of the International Convention on Civil and Political Rights are not enshrined in section 50 of the Constitution. Article 10 reads as follows:

- “2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

However, the Prisons Act [*Chapter 7.11*] requires convicted and unconvicted prisoners, and adults and juveniles, to be segregated from each other.

### Right to human dignity (section 51)

Everyone has inherent dignity and the right to have it respected and protected. Recognition of the inherent dignity and worth of each human being is one of the foundational values of the Constitution (section 3(1)(e)) and the right to have it respected infuses the whole Declaration of Rights in the Constitution.<sup>17</sup> In *S v Chokuramba* CCZ 10-2019, the Chief Justice said:

“human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is therefore both the supreme value and a source for the whole complex of human rights enshrined in Chapter 4 of the Constitution.”

The Chief Justice described the nature of human dignity as follows:

“Human dignity is ... a special status which attaches to a person for the reason that he or she is a human being. It is the fact of being human that founds human dignity. Human dignity is therefore inherent in every person all the time and regardless of circumstances or status of the person. All human beings are equal, in the sense that each has inherent dignity in equal measure. What this means is that human dignity is innate in a human being. It remains a constant factor and does not change as a person goes through the stages of development in life. ... In other words, every human being merits equal respect for his or her inherent dignity regardless of social, economic and political status.”

### Freedom from torture or cruel, inhuman or degrading treatment or punishment (section 53)

No one may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. The meaning of “torture”, “inhuman treatment” and “degrading treatment” was discussed in the case of *Mukoko v Attorney-General* 2012 (1) ZLR 321 (S) where it was held that:

“The distinction between the notion of torture and the other two concepts lies principally in the intensity of physical or mental pain and suffering inflicted, in respect of torture, on the victim intentionally and for a specific purpose. Torture is an aggravated and deliberate form of inhuman or degrading treatment. What constitutes torture, or inhuman or degrading treatment, depends on the circumstances of each case. The definition of torture often adopted by courts as a minimum standard is that provided under article 1(1) of the United Nations Convention

---

<sup>17</sup> Section 46(1)(b) of the Constitution states that in interpreting the Declaration of Rights courts must promote values and principles underlying a democratic society based on, *inter alia*, human dignity.

Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment 1987. In terms of this definition, the torture must be inflicted for the purpose of obtaining information or a confession.”<sup>18</sup>

No limits may be placed on this freedom.<sup>19</sup> The Lancaster House constitution, in section 15, authorised the corporal punishment (i.e. whipping) of male juveniles and the imposition of the death sentence by hanging even if there was a delay between the imposition of the sentence and its execution. The first of these exceptions (whipping of juveniles) has been declared unconstitutional in the case of *S v Chokuramba* CCZ 10/2019, a decision of the Constitutional Court. It is doubtful if the second exception (delay in imposition of sentence) can be justified under the present Constitution.

#### Freedom from forced or compulsory labour (section 55)

No one may be made to perform forced or compulsory labour.

The Lancaster House constitution specifically stated that prisoners could be required to perform labour as part of their sentences, and that detainees could be made to clean out their cells and perform similar labour; these exceptions are covered by the general limitation in section 86 of the present constitution.

#### Equality and non-discrimination (section 56)

Everyone has the right to equal protection and benefit of the law.

We shall deal later with the meaning of “protection of the law”.

#### Right to privacy (section 57)

The right to privacy includes the right not to have one’s home, premises or property entered without one’s permission and not to have one’s person, home, premises or property searched.

This right is subject to the general limitations contained in section 86 of the constitution.

#### Freedom of movement (section 66)

Everyone who is legally in Zimbabwe is entitled to move freely within Zimbabwe and to leave Zimbabwe.

Section 86 of the constitution allows reasonable limits to be imposed on this right. Such limits would include restrictions on the movement of prisoners (obviously), as well as the power of courts to restrict the right of suspects and witnesses to leave Zimbabwe.

#### Right to a fair hearing and rights of accused persons (sections 69 & 70)

Anyone accused of a crime has the right to a fair and public trial within a reasonable time before an independent and impartial court (section 69(1)).

Everyone has a right, at their own expense, to choose and be represented by a lawyer before any court, tribunal or forum (section 69(4)), and accused persons must be informed of this right (section 70(1)(f)).

Section 70 further elaborates the rights of accused persons:

---

<sup>18</sup> Headnote, at page 323.

<sup>19</sup> Section 86(3) of the constitution.

- They must be presumed innocent until proved guilty. Although the degree of proof required to prove guilt is not specified, it has always been assumed that it is proof beyond reasonable doubt.<sup>20</sup> The South African Constitutional Court has held that a similarly-worded provision (sec 35(3)(h)) of that country's constitution requires proof beyond reasonable doubt.<sup>21</sup>
- They must be told promptly what the charge is against them, in sufficient detail to enable them to prepare their defence, and they must be given adequate time and facilities to prepare their defence. Accused persons cannot simply be dumped in remand prison to await their trial, therefore, without being given reasonable facilities to prepare their defence.
- They have a right to a lawyer paid for by the State if substantial injustice would result from their being unrepresented, and must be told of this right.
- They have a right to be present during their trial.
- They must be allowed to challenge the State's evidence and to lead evidence to support their case.
- They have a right to remain silent and cannot be compelled to give self-incriminating evidence.
- If they are convicted of a crime, they have the right to have the case reviewed by a higher court or to appeal to a higher court.

These rights can be limited under section 86 of the constitution but the limitations must not go so far as to render the trial unfair, because the right to a fair trial cannot be limited (section 86(3)(e)).

Evidence that has been obtained illegally, i.e. in a way that violates any provision of the Declaration of Rights, must be excluded (i.e. is inadmissible) in any criminal trial if its admission as evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest (section 70(3)).<sup>22</sup>

#### The right not to be compulsorily deprived of property (section 71)

Property (other than agricultural land) cannot be taken compulsorily except in accordance with a law that ensures due process.

Once again, reasonable limits may be imposed on this right in terms of section 86.

#### Rights of children (section 81)

Children must be given equal treatment before the law, including the right to be heard, and they are entitled to adequate protection by the courts.

Obviously the extent of a child's right to be heard will depend on the child's age and capacity to understand.

Some of the concepts in the Declaration of Rights merit more detailed discussion:

---

<sup>20</sup> *S v Chogugudza* 1996 (1) ZLR 28 (S) at 32E-F.

<sup>21</sup> See *S v Boesak* 2001 (1) SA 912 (CC) at 920D-E and the cases there cited.

<sup>22</sup> See generally the Irish case of *People (AG) v O'Brien* [1965] IR 142. Section 258A of the Criminal Procedure and Evidence Act now sets out the considerations that courts must take into account in deciding whether or not to allow illegally-obtained evidence to be produced.

## **Fair trial**

As we have seen, section 69(1) of the Constitution states that accused persons are entitled to “a fair and public trial”, and section 70 goes on to elaborate specific rights that must be accorded to them, such as the right to be presumed innocent, to be given adequate time to prepare their defence, and so on. Clearly, as in the South African constitution, the right to a fair trial embraces more than the specific rights set out in section 70. What does it include?

In, the Constitutional Court (per Ackermann J) said: *S v Dzukuda & Ors; S v Tshilo* 2000 (4) SA 1078 (CC)

“The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence develops. [para 9]

“It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. ... At the heart of the right to a fair trial and what infuses its purpose is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean<sup>23</sup> concept. In deciding what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our constitution.<sup>24</sup> An important aim of the right to a fair trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction but which arise primarily from considerations of dignity and equality. [para 11]

“More particularly, in relation to sentencing ..., it seems to me that what the right to a fair trial requires, amongst other things, is a procedure which does not prevent any factor which is relevant to the sentencing process and which could have a mitigating effect on the punishment to be imposed from being considered by the sentencing court.” [para 12]

In *S v Sunday & Anor* 1995 (1) SA 497 (C) at 507C, Thring J said:

“[T]he concept of a ‘fair trial’, including a fair appeal, embraces fairness, not only to the accused or the appellant, as the case may be, but also, in a criminal case, to society as a whole, which usually has a real interest in the outcome of the case.”

The right to a fair trial entails informed participation by the accused, where he is unrepresented. A court must therefore explain all procedural rights and options to an unrepresented accused, and must do so at every critical stage.<sup>25</sup>

The concept of a fair trial includes the right to have a prosecutor who acts, and is perceived to act, without fear, favour or prejudice.<sup>26</sup>

Generally, it is an essential element of a fair trial that accused persons should be treated fairly and in accordance with lawful procedures, not only during the trial itself but from the moment they first come to the attention of the Police or other law enforcement agencies. If lawful procedures are violated at any stage in the process, not only does the accused person have a civil remedy against the Police or the State, but the violation very often affects the validity of subsequent stages. So for example, if the Police extract a confession from an

---

<sup>23</sup> Variable, many-sided.

<sup>24</sup> They are also founding values of the Zimbabwean constitution: see section 3.

<sup>25</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 10<sup>th</sup> ed page 283.

<sup>26</sup> *Bonugli & Anor v Deputy National DPP & Ors* 2010 (2) SACR 134 (T) at 143; [2008] ZAGPHC 28. See also *Smyth v Ushekowunze Anor* 1997 (2) ZLR 544 (S).

accused person by the use of force or undue influence, the confession will be inadmissible in the subsequent trial; and if there is an irregularity in the course of a trial, it may result in the accused person's acquittal on appeal.

### **Equal protection of law**

Section 56(1) states that everyone is entitled to equal protection of the law.

Protection of the law is explained by Linington, Constitutional Law of Zimbabwe para 994:

“In essence, the right to the protection of law means that persons are entitled to have their lawful rights protected. In addition, no one may be proceeded against, either in criminal or civil matters, except to the extent that such proceedings are authorised by law.”

This is a cornerstone of a constitutional State, a State founded on the rule of law. A corollary to the public's right to the protection of law is that the Police, like everyone else, must obey the law<sup>27</sup>, for it is in society's interests that the Police should act lawfully and that meaningful control should be exercised over their actions. They must follow proper, lawful procedures when exercising their functions in the control of crime. For example, they are not entitled to arrest or detain persons except when authorised by law to do so; they may not search for and seize property unless the law permits the search and seizure. If police officers breach the law, anyone whose rights have been violated has lawful remedies against them and usually against their employer, the State.

Equal protection of the law goes further, by emphasising that everyone must have the same access to the law and courts, and be treated equally by the law and courts, both in procedures and in the substance of the law. The right to equal protection is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness. In American jurisprudence, equal protection of the law

“means that legislation that discriminates must have a rational basis for doing so. And if the legislation affects a fundamental right (such as the right to vote) or involves a suspect classification (such as race), it is unconstitutional unless it can withstand strict scrutiny.”<sup>28</sup>

In other words, laws may discriminate or differentiate between different classes of people but the discrimination or differentiation must be rational. And of course it cannot be unfair because that is prohibited by section 56(3) of the Constitution.

### **Public trial**

Section 69(1) of the Constitution states that:

“Every person accused of an offence has the right to a fair and public trial ...”

This provision, which is also reflected in section 49 of the High Court Act [*Chapter 7:06*], gives effect to a basic principle, that “the searching light of public opinion provides the most effective safeguard against the danger of an arbitrary and despotic judiciary.”<sup>29</sup>

The exceptions (i.e. the cases when the public may be excluded from a trial) are:

#### **General power to restrict publicity**

The Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*] allows the court to make the following orders, either *mero motu* or on the application of a party:<sup>30</sup>

---

<sup>27</sup> See *Chavunduka & Anor v Commissioner of Police & Anor* 2000 (1) ZLR 418 (S) at 421H-422B.

<sup>28</sup> Black's Law Dictionary, 4th pocket edition (2011).

<sup>29</sup> Lansdown & Campbell S.A. *Criminal Law & Procedure* vol 5 p. 463.

<sup>30</sup> See section 3 of the Act.

- the court may order all persons or a class of persons to be excluded from the proceedings (i.e. that the trial should be held *in camera*;
- the court may order that the name, address or other information likely to identify anyone concerned or mentioned in the proceedings should not be disclosed publicly, or that information that might reveal a place or locality concerned or mentioned in the proceedings should not be disclosed publicly;
- the court may order that the whole or part of the proceedings should not be publicly disclosed.

These orders may be made only for the following reasons:<sup>31</sup>

- where publicity would prejudice the interests of justice;
- in the interests of public morality;
- in the interests of the welfare of persons under the age of 18;
- to protect the private lives of persons concerned in the proceedings.

These powers should be exercised sparingly. It is inappropriate for them to be used merely in order to spare the accused and his family embarrassment.<sup>32</sup>

A court must make an order listed above whenever it is satisfied that it is necessary or expedient to do so in the interests of defence, public safety, public order or the economic interests of the State.<sup>33</sup>

Where a trial is held *in camera*, the court should give a full judgment and provide the parties with a copy of it; an edited version of the charge and judgment should be made available to the public as soon as possible.<sup>34</sup>

### Ministerial certificates prohibiting publicity

Under section 4 of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*], a Minister can issue a certificate stating that it would not be in the public interest to disclose publicly the fact that any proceedings may or will be instituted in any court, or any fact connected with any such future proceedings. The Minister can also issue a notice restricting the transmission of documents from one party to any such proceedings to another such party. The notice may impose conditions restricting the copying of any such document, or the taking of any such document out of Zimbabwe.

The constitutionality of section 4 of the Act is doubtful, since it may jeopardise an accused person's right to a fair trial by restricting his ability to prepare and present his defence.<sup>35</sup> In so far as the section allows a Minister to issue a certificate prohibiting the public disclosure of evidence given in criminal cases, the section is based on section 18(12) of the old (Lancaster House) Constitution, which expressly provided for such certificates. There is no equivalent provision in the current Constitution.

---

<sup>31</sup> Section 3 of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*].

<sup>32</sup> *R v Miller* 1969 (2) RLR 472 (G).

<sup>33</sup> Section 3(3) of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*].

<sup>34</sup> *S v Niesewand (1)* 1973 (1) RLR 210 (A).

<sup>35</sup> See further Reid Rowland *Criminal Procedure in Zimbabwe* p. 15–10.

### **Presence of accused**

Normally every trial must take place in the presence of the accused, and he must be present when the witnesses give their evidence.<sup>36</sup> This is a basic principle of the law of criminal procedure.<sup>37</sup> A trial may, however, take place in the accused's absence in the following circumstances:

- If the accused so conducts himself as to render it impractical to continue the proceedings in his presence. In that event, the court may order him to be removed and may direct the trial to proceed in his absence.<sup>38</sup> The court should do so only as a last resort, however, and before doing so the court should warn the accused of the consequences of his behaviour. If the accused is removed he should be brought back at the end of the State case and asked whether he wishes to lead evidence.<sup>39</sup>
- If the accused has been summoned to appear charged with a crime for which the penalty is a fine, and only in default of payment of the fine may imprisonment be imposed, the accused need not appear personally but may appear through a legal practitioner whom he has authorised to represent him. If there is no legal practitioner available, the accused may appear through anyone else acting as his representative.<sup>40</sup> If in such a case the accused does not appear either personally or through a representative, the court may proceed to hear the case in his absence and may direct the collection of any fine imposed upon him.<sup>41</sup> This procedure, though no doubt very convenient, may be unconstitutional.<sup>42</sup>

### **Representation of accused**

#### Legal representation

Everyone charged with a crime is entitled to defend himself in person or, at his own expense, by a legal practitioner of his own choice.<sup>43</sup> This right is not, however, absolute. As was said in the headnote to *S v Paweni & Anor* 1984 (2) ZLR 16 (H):

“[T]he accused's predilection for a particular legal practitioner who happens to be unavailable on the date on which the accused's case is set down for trial does not mean that the case must be postponed until such time as that particular practitioner is available. The provisions of s 18 simply mean that the accused is entitled to a choice of not having a particular practitioner, whom he does not want, foisted on him. The accused's desire for particular counsel is only one consideration: there are others, such as the principle that cases should be brought to a conclusion with the minimum of avoidable delay. In this regard, the interests of all parties must be considered, not merely the interests of the accused. Such other factors must be considered as: how much notice of trial has been given; the complexity of the case; and the availability of other competent lawyers.”

But while it may sometimes be appropriate for the court to order a trial to go ahead in the absence of the accused's legal practitioner, the discretion to do so must be exercised judi-

---

<sup>36</sup> Section 70(1)(g) of the Constitution and section 194(1) of the Criminal Procedure and Evidence Act

<sup>37</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 97.

<sup>38</sup> Section 194(1) of the Criminal Procedure and Evidence Act.

<sup>39</sup> *R v Pauline* 1928 TPD 643 at 646, cited in *R v Mpofo* 1970 (1) RLR 28 (G).

<sup>40</sup> Section 357 of the Criminal Procedure and Evidence Act.

<sup>41</sup> Section 357(2) & (3) of the Criminal Procedure and Evidence Act.

<sup>42</sup> See Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–26.

<sup>43</sup> Section 70(1)(d) of the Constitution and section 191(a) of the Criminal Procedure and Evidence Act.

cially. Where the practitioner's absence is not due to the fault of the accused, it would be wrong to penalise him.<sup>44</sup> On the other hand, where the accused has had ample opportunity to obtain legal representation and has failed to do so, he cannot subsequently attack the proceedings unless he can furnish an acceptable explanation for his failure.<sup>45</sup>

Under section 70(1)(e) of the Constitution an accused person is entitled to be represented by a lawyer assigned by the State and at State expense "if substantial injustice would otherwise result", and he must be informed promptly of that right.<sup>46</sup> In the South African case of *S v Khanyile & Anor* 1988 (3) SA 795 (N) it was pointed out (to quote the headnote):

"It is well established in our law that every person accused of a crime and able to obtain the services of a lawyer has the right to be defended by one. The exercise of that right is vital to the fairness of the proceedings, and the denial of the right therefore makes the ensuing trial *per se* unfair. There is no real difference between an accused who, because he cannot afford the expense, is unable to obtain the services of a lawyer. The latter's trial is no less unfair."

### Representation of juveniles by guardian

An accused person under the age of 16 who is being tried in a magistrates court may be defended by his natural or legal guardian, who may examine and cross-examine witnesses.<sup>47</sup>

### Representation by other persons

An accused person may be represented at his trial, and have the witnesses examined and cross-examined, by any other person where the court considers that he requires the assistance of that other person and has permitted him to be so assisted.<sup>48</sup>

### Magistrate to inform accused of right to be represented

At the beginning of every trial in a magistrates court, before the accused has pleaded to the charge, the magistrate must inform him of his right to legal representation or to be represented by his guardian (if the accused is a juvenile) or by other persons as above. The accused's response on being told this must be recorded.<sup>49</sup> There seems to be no similar provision requiring accused to be informed of their right to representation before a trial in the High Court.

## **Presumption of innocence**

Criminal procedure deals with the detection, investigation and prosecution of suspects and accused persons, not of criminals. It is vitally important to remember this distinction. Rules of criminal procedure are for everybody, not just for "criminals", so the rules must be fair and just to allow everyone to live under them.

Everyone is regarded as innocent until properly convicted by a court of law. This is a fundamental presumption which is entrenched in the Constitution (see above) and in many in-

---

<sup>44</sup> Cf *S v Nqula* 1974 (1) SA 801 (E).

<sup>45</sup> *R v Second* 1969 (2) RLR 285 (A).

<sup>46</sup> Section 70(1)(f) of the Constitution.

<sup>47</sup> Section 191(b) of the Criminal Procedure and Evidence Act. Note that this provision applies only to trials in magistrates courts.

<sup>48</sup> Section 191(c) of the Criminal Procedure and Evidence Act.

<sup>49</sup> Section 163A of the Criminal Procedure and Evidence Act. The section does not require the accused to be told of his right to legal aid, i.e. to have a legal practitioner assigned to him at State expense, as mandated by section 70(1)(f) of the Constitution.

ternational conventions<sup>50</sup>. The presumption applies not only to criminal trials, but to all pre-trial stages such as arrest. The word “properly” is important: it connotes compliance with the rules of evidence and criminal procedure. A conviction is an objective and impartial official pronouncement that a person has been proved legally guilty by the prosecution in a properly conducted trial. In a state under the rule of law, only legal guilt counts. If a person is acquitted because a rule of procedure or evidence has not been complied with (e.g. because a confession was not proved to have been made freely and voluntarily), it is wrong to say that the rule has allowed a criminal to go free; it has simply caused a person who was presumed to be innocent from the outset to continue to be presumed (labelled) innocent because the State could not legally prove his guilt.

So it is not entirely true to say that the purpose of criminal investigations, trials and post-trial procedures is to find the truth in order to convict the guilty and acquit the innocent. The discovery of truth is not the highest value. Sometimes evidence that is true will be excluded in order to achieve a higher value. For example, certain evidence may be excluded because it is protected by legal practitioner-and-client privilege, even though it may be relevant and true. The exclusion serves to protect a value that is higher than the discovery of the truth, namely the encouraging of free and open communication between legal practitioners and their clients. Again, confessions that have been extracted by torture or force are excluded even though they may be true: the exclusion protects accused persons, innocent and guilty, against violation of their fundamental right to bodily security.

The prevalence or seriousness of the crime cannot be allowed to displace the presumption of innocence.<sup>51</sup>

### ***Burden of proof: proof beyond reasonable doubt***

To secure a conviction, the prosecution must prove the accused person’s guilt beyond a reasonable doubt.<sup>52</sup> The presumption of innocence ensures that the burden of proof is on the prosecution; an accused person does not have to prove that he is innocent. The prosecution must cover every essential element of the crime with which the accused is charged by presenting admissible evidence in order to prove that the accused is guilty. If even a single element is not proved by the prosecution beyond a reasonable doubt, the accused cannot be convicted.<sup>53</sup> If the prosecution succeeds in proving a *prima facie* case against the accused and the accused does nothing to disturb it, the *prima facie* proof may “harden” into proof beyond reasonable doubt, and in that event the accused will be convicted, because there is nothing which produces a reasonable doubt in the court’s mind about the guilt of the accused on each of the elements of the crime.<sup>54</sup> It may be noted here that less evidence will be enough to establish a *prima facie* case where the facts are peculiarly within the

---

<sup>50</sup> Article 11(1) of the Universal Declaration of Human Rights: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Article 14.2 of the International Covenant on Civil and Political Rights: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

<sup>51</sup> *S v Coetzee & Ors* 1997 (3) SA 527 (CC) at 612E – 613B

<sup>52</sup> Section 18(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. Although the Constitution does not state expressly that this is the standard of proof required, it is implied from section 70: See *S v Chogogudza* 1996 (1) ZLR 28 (S) at 32 E and *S v Boesak* 2001 (1) SA 912 (CC) at 920D-E and the cases there cited.

<sup>53</sup> Section 18(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

<sup>54</sup> Joubert ed *Criminal Procedure Handbook* 10th ed p. 19.

knowledge of the accused person.<sup>55</sup> If, however, the accused can make the court doubt reasonably that his guilt on any one or more of the essential elements of the crime has been proved, he must be acquitted.<sup>56</sup> If there is some evidence before the court which raises a defence to the charge, whether that evidence has been adduced by the accused or the defence, the prosecution must prove beyond a reasonable doubt that the defence does not apply.<sup>57</sup> In other words, the accused does not have to go so far as to establish the defence on a balance of probabilities (unless a statute specifically places the burden of proving the defence on him); all he need do is to lay a basis for the court having to consider the defence.<sup>58</sup>

Proof beyond reasonable doubt is the standard of proof in criminal cases; proof on a balance or preponderance of probabilities is the standard in civil matters. If at the end of a civil case, e.g. an action for damages, the court is in doubt as to whether the plaintiff has proved his case, the court will assess the probabilities, and if the plaintiff's case seems more probable than the defendant's the plaintiff will win. That is not so in criminal trials: even if the State's case is more probable than the version of the facts put forward by the accused, the accused must be acquitted if there is a reasonable possibility (not a probability) that his version may be true. It is not necessary for the court to believe the accused, so long as there is a reasonable possibility that his version is true.

For an accused person to be convicted, the court must be satisfied of his guilt beyond a reasonable doubt. This is so even in cases where, as stated earlier, the prosecution has established a *prima facie* case and the accused, by refusing to give evidence, does not rebut it. The *prima facie* case will harden into proof beyond reasonable doubt only if the court, looking at the totality of the evidence, is satisfied beyond a reasonable doubt that the accused person is guilty.

It is impossible to define what is meant by "proof beyond reasonable doubt" because there is no standard for measuring the intensity of human belief. Essentially a common-sense approach has to be adopted. For judges and magistrates the standard of proof is a matter of experience and intuition rather than analysis.<sup>59</sup> A good explanation of the concept was given by Denning J (as he then was) in *Miller v Minister of Pensions* [1947] 2 All ER 372 (KBD) at 373<sup>60</sup>:

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

A rather less eloquent explanation was given by a South African judge, Rumpff JA, in *S v Glegg* 1973 (1) SA 34 (A) at 39A (official translation):

"The concept 'reasonable doubt' cannot be precisely defined, but this can be said: that it is a doubt which exists because of probabilities or possibilities which are considered reasonable

---

<sup>55</sup> *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173 and *R v Van der Linde & Anor* 1933 OPD 5 at 8, cited in *S v Mpofu* 2012 ZLR 384 (H) at 390-1.

<sup>56</sup> *R v Difford* 1937 AD 370 at 373.

<sup>57</sup> Section 18(4) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

<sup>58</sup> Hoffmann & Zeffertt *The S.A. Law of Evidence* 4th ed p.498.

<sup>59</sup> Hoffmann & Zeffertt *The S.A. Law of Evidence* 4th ed p. 525.

<sup>60</sup> Quoted in Hoffmann & Zeffertt *The S.A. Law of Evidence* 4th ed p. 525. See that textbook, and also Lansdown & Campbell *SA Criminal Law & Procedure* vol 5 pp 908 – 911.

on the ground of general human experience and knowledge. Proof beyond a reasonable doubt is not equated with proof beyond the slightest doubt, because the *onus* to render proof at so high a standard would frustrate the administration of the criminal law.”

It has already been noted, however, that one cannot define “proof beyond a reasonable doubt” clearly and comprehensively because what constitutes proof in any particular case depends on the facts and circumstances of that case. As pointed out by Hoffmann & Zeffertt *The South African Law of Evidence* 4th ed pp 525-6:

“[I]t is easier to sense a doubt than to define one. Trying to define a doubt is rather like trying to translate music into words – an exercise in the fuzzy rhetoric of metaphor. ... [A]n elaborate citation of *dicta* can only churn up a relatively simple concept into a mud of words.”

The prosecution will not have proved the accused person’s guilt beyond a reasonable doubt if, at the conclusion of the evidence, the court thinks there is a reasonable possibility that the accused’s explanation may be substantially true, even if the court considers his explanation is improbable.<sup>61</sup> On the other hand, if the court is “sure” that the accused is guilty, then the prosecution will have proved his guilt beyond a reasonable doubt.

### Placing burden of proof on accused persons

Section 70(1)(a) of the Constitution gives every accused person the right to be presumed innocent until proved guilty, but sometimes a statute places the burden of proving a particular fact on the accused person. This is usually done where the fact is particularly within his own knowledge and is easy for him to establish, whereas it would be difficult or impossible for the prosecution to prove. Guidelines were laid down in *S v Chogugudza* 1996 (1) ZLR 28 (S), as follows:

1. A statute cannot validly impose on the accused the burden of proving his innocence or disproving his guilt.
2. Any presumption must not place the entire onus on the accused; there is always an onus on the prosecution to bring him within the general framework of an enactment before any onus may be placed on him to prove his defence.
3. The presumption may relate to a state of mind, that is an intention, where the element of the crime is a fact exclusively or particularly within the knowledge of the accused.
4. A presumption will be regarded as reasonable if it places an onus upon the accused where proof by the prosecution of such a specific fact is impossible or difficult but where the fact is well known by the accused.
5. The presumption must not be irrebuttable (i.e. incapable of being disproved).

One example of where the law requires the accused person to prove facts is section 146(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which imposes on an accused person the onus of proving an exception, exemption, proviso, excuse or qualification in the description of a crime.<sup>62</sup> What this means is that sometimes statutory provisions contain exceptions under which some people are exempted from the operation of a statutory provision. For example, no one is allowed to possess certain drugs unless he or she has been issued with a licence to possess them. Holders of licences are exempted from the general prohibition against possession of the drugs. In such cases the rule is that incriminating factors must be proved by the prosecution and exculpatory factors by the accused.<sup>63</sup> So in the example given, if a person is charged with possessing drugs the prosecu-

---

<sup>61</sup> *R v Difford* 1937 AD 370 at 373. See also Hoffmann & Zeffertt *The S.A. Law of Evidence* 4th ed p. 525-6.

<sup>62</sup> See page 11 of these notes.

<sup>63</sup> See Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 209.

tion must prove that the accused possessed the drugs, and it is up to the accused to prove that he held a licence.

In all cases where an onus is imposed on the accused to prove a fact, the most he has to do is to prove the fact on a balance of probabilities; he never has to establish anything beyond a reasonable doubt.<sup>64</sup> If the court can say that the accused's story is more probable than not, then he has discharged the onus.<sup>65</sup>

### ***The right of [or to] silence: privilege against self-incrimination***

The right to remain silent can be described as the absence of a legal obligation to speak.<sup>66</sup> This so-called "right of silence" is not a single right but rather:

"a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute."

(Per Lord Mustill in the English case of *R v Director of Serious Fraud Office, e.p. Smith* [1993] AC 1 (HL), [1992] 3 All ER 456 (HL)). In that case the learned Judge listed six separate rights or immunities that are covered by the term:

1. A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
2. A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
3. A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
4. A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
5. A specific immunity, possessed by persons who have been charged with a crime, from having questions material to the crime addressed to them by police officers or persons in a similar position of authority.
6. A specific immunity (at least in certain circumstances ...) possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

The first of these immunities is based on the right to privacy; the others are based on a revulsion against abuses that may arise from inquisitorial criminal proceedings, together with a desire to minimise the risk of a person being convicted through a false extra-judicial confession and concern for the reliability of forced confessions. There is also a perception that it is unfair to put someone in a position where he is exposed to punishment whatever he does (if he speaks he may condemn himself out of his own mouth, and if he remains silent he may be punished for not speaking).

In Zimbabwe an accused cannot be forced to testify at his trial; he has a right to silence, a privilege against self-incrimination. This right is conferred by sections 50(4)(a) of the Con-

---

<sup>64</sup> Section 18(3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

<sup>65</sup> Reid Rowland, *Criminal Procedure in Zimbabwe* p. 15-11. See also *Ex parte Minister of Justice: In re R v Bolon* 1941 AD 345, cited in Hoffmann & Zeffertt *The S.A. Law of Evidence* 4th ed p. 529.

<sup>66</sup> Currie & de Waal *The Bill of Rights Handbook* 6th ed p. 758.

stitution [pre-trial silence] and 70(1)(i) of the Constitution [silence during trial]; the right is also enshrined in various international human-rights conventions.<sup>67</sup>

Generally speaking, a suspect cannot be compelled to make a statement to the Police, and any statement he may make must be proved to have been made freely and voluntarily. Suspects are told on arrest that they have the right to remain silent (section 50(4)(b) of the Constitution and section 41A of the Criminal Procedure and Evidence Act [*Chapter 9:07*]). Hence the fact that a suspect has remained silent when questioned by the Police cannot be held against him, because he is exercising a constitutional right of which he has been informed. No adverse inference, therefore, can be drawn against him because of such silence.<sup>68</sup>

The right to silence arises logically from two basic aspects of our procedure:

- That the accused person is presumed innocent until proved guilty. If he is presumed innocent, then he should not have to do anything to negative any presumption of guilt, since there is no such presumption.
- That our system is based on an adversarial system, in which the State and the accused oppose each other as adversaries, with the judge acting largely as an impartial referee or umpire. The accused should not have to assist the State, his adversary.

If adverse inferences can be drawn from an accused person's silence, then the right to silence is largely negated.

In the United Kingdom, the 1981 Royal Commission on Criminal Procedure (the Philips Commission) said:

“Any attempt ... to use a suspect's silence as evidence against him seems to run counter to a central element in the accusatorial system of trial. There is an inconsistency of principle in requiring the onus of proof at trial to be upon the prosecution and to be discharged without any assistance from the accused and yet in enabling the prosecution to use the accused's silence in the face of police questioning under caution as any part of their case against him at trial.”

Under the Criminal Procedure and Evidence Act, however, the right of silence has been substantially eroded:

- Adverse inferences are allowed be drawn from an accused person's silence: see sections 67, 115, 189, 199 and 257 of the Criminal Procedure and Evidence Act. In particular, section 257 states that if a person who is being questioned by the police fails to mention a fact which is relevant to his defence and which he could reasonably be expected to mention in the circumstances, a court may draw adverse inferences from his failure and treat the failure as evidence corroborating any other evidence given against him.
- If an accused person applies for bail, he must disclose whether or not other charges are pending against him, whether or not he has been granted or refused bail on those charges, and whether or not he has previous convictions (section 117A(5) of the Criminal Procedure and Evidence Act).
- Before evidence is led in a criminal trial, the accused must outline his defence:
  - An accused who is indicted for trial in a the High Court is obliged by section 66(6) of the Criminal Procedure and Evidence Act to provide a written outline

---

<sup>67</sup> For example, article 14.3 (g) of the International Covenant on Civil and Political Rights.

<sup>68</sup> *S v Thebus & Anor* 2003 (6) SA 505 (CC) at 543C-E.

of his defence, and if he fails to disclose a relevant and material fact adverse inferences may be drawn (section 67(2) of the Act).

- An accused who pleads not guilty in a trial in a magistrates court is obliged by section 188 of the Criminal Procedure and Evidence Act to give an outline of his defence, and if he fails to disclose a relevant and material fact adverse inferences may be drawn (section 189(2) of the Act).
- If an accused declines to give evidence in a trial, he may nevertheless be questioned by the prosecutor and the court in terms of section 198(9) of the Criminal Procedure and Evidence Act, and again, if he fails to disclose a relevant and material fact the court may draw adverse inferences from his failure (section 199(1) of the Act).
- Facts discovered through an inadmissible confession made by the accused are admissible in evidence at his trial, and the prosecution can disclose in evidence that the facts were discovered as a result of information given by the accused (section 258 of the Act).

These provisions erode the right of silence significantly<sup>69</sup> and, to the extent they do, so they are unconstitutional.

Note, however, that even giving full allowance to the accused's right of silence, if the State has established a *prima facie* case against him at his trial and he nevertheless elects to remain silent, the *prima facie* case may harden into sufficient evidence for a conviction.<sup>70</sup> This is not because of his silence but because he has failed to disturb or rebut the case the State has made against him. That case, being uncontroverted, is regarded as proved beyond reasonable doubt.

### **Reasonableness**

Many of the decisions that have to be made in the criminal procedure process are required to be reasonable. For example, a police officer is entitled to arrest a person without a warrant if he has "reasonable grounds" to suspect that the person has committed a crime<sup>71</sup>; a search warrant is issued if there are "reasonable grounds" for believing that articles liable to seizure are in the premises to be searched; and force may be used to effect and arrest or a search if it is "reasonably necessary" in the circumstances.

What is meant by "reasonable" in the circumstances? The word is difficult to define; indeed, one judicial dictionary says:

"It would be unreasonable to expect an exact definition of the word 'reasonable'."<sup>72</sup>

The Oxford English Dictionary defines the word variously:

4. Agreeable to reason; not irrational, absurd or ridiculous.
5. Not going beyond the limit assigned by reason ..."

What is reasonable in any particular case depends on the circumstances.

The following are the guidelines, in relation to reasonable grounds for suspicion:

- A person can be said to have "reasonable grounds" to believe or suspect something or to believe or suspect that certain action is necessary if:

---

<sup>69</sup> *MacFarlane v Sengweni NO & Anor* 1995 (1) ZLR 385 (S) at 389E-G.

<sup>70</sup> *R v Stidolph* 1965 RLR 552 (A) at 555B, cited in *S v Mukungatu* 1998 (2) ZLR 244 (S) at 247E-F.

<sup>71</sup> Section 25 of the Criminal Procedure and Evidence Act.

<sup>72</sup> *Stroud's Judicial Dictionary*, 4th ed, quoted in *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (H) at 343.

- he really believes or suspects it; and
  - his belief or suspicion is based on certain facts which are known to or perceived by him or about which he has been informed by an apparently reliable person; and
  - in the circumstances, and in view of the existence of those facts, any reasonable person would have held the same belief or suspicion.
- There will be grounds for a certain suspicion or belief if the suspicion or belief is reconcilable with the available facts. The existence or otherwise of those facts is objectively determined, so one has to look at the facts as they really are and not as someone may think they are.
  - Once a person has established what the facts really are, he will evaluate them and make an inference from them with regard to the existence or otherwise of other facts, which for the time being he is unable to determine. Once he has made that inference, it can be said that he believes or suspects that those other facts exist.
  - His belief or suspicion will be reasonable only if it can be said that any reasonable person would have held the same belief or suspicion in the circumstances. The words “any reasonable person” refer to any other person who has more or less the same background knowledge (such as training and experience) as the person who actually holds the belief or suspicion.
  - So a person can be said to have “reasonable grounds” to believe or suspect something if he actually believes or suspects it; his belief or suspicion is based on actual facts from which he has drawn an inference regarding the existence of other facts, and if any reasonable person would, in view of those facts, also have drawn the same inference. These are factual questions that will have to be determined with reference to the circumstances of each case.

### ***Rights and duties: crime control and due process***

The law of criminal procedure must strike a balance between the rights of the individual (due process) and the control of crime (crime cannot be eradicated altogether; at most the State can keep it at a tolerable level). Every right or power conferred on the Police (e.g. the power of arrest) is matched by a correlative duty on the part of members of the public to submit to that right or power. There has to be a balance: if the State were given absolute powers to control crime, we would live under a tyranny; if, on the other hand, the rights of individuals were given absolute precedence, the State would be powerless to cope with crime. So there must be a balance. Strictly speaking, the balance is not between the rights of the State and those of the individual, but rather between two competing community interests: the community’s interest in crime control and the community’s interest in fair treatment of its members and in their freedom.

The following are some of the points that should be considered in striking a proper balance:

- Rules of criminal procedure cannot be based on the assumption that they will apply only to criminals; they must allow for the fact that innocent people may be drawn into the criminal procedure process.
- While rules of criminal procedure should not increase the probability that innocent people will be convicted, it must be accepted that the more the system guards against convicting the innocent the greater will be the risk of allowing criminals to go free. It is a miscarriage of justice if an innocent person is convicted, but it is equally a failure of justice if a person who has committed a crime is acquitted.

- If the State were to have absolute powers it would probably be able to control crime to a significant extent, but the result would be a tyranny in which suspects could be tortured to extract confessions and people could be searched, and have their homes entered and searched, at the whim of a government officer. On the other hand, if the rights of the individual were absolute (i.e., if the State could not interfere with them at all) then the State would be unable to prevent crimes being committed.
- Rules of criminal procedure should regulate State power both positively and negatively. Positively, in the sense of giving State officials, e.g. the Police, power to arrest suspects. Negatively, in the sense of limiting the circumstances in which those powers can be exercised.
- While rules of criminal procedure must respect the fundamental rights of suspects, they must also have regard to the victims of crime and the security of law-abiding citizens.
- Should the courts in criminal trials be allowed to consider evidence that has been obtained illegally? Such evidence may be reliable despite the way in which it was obtained, but by admitting it a court may be sending a signal to State officers that unlawful conduct in the course of obtaining evidence is acceptable and that they can violate suspects' rights in order to obtain it. There is no simple answer to this question, but section 70(3) of the Constitution indicates how it should be answered by stating that illegally obtained evidence must be excluded "if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest." This question is dealt with in more detail below under the heading "Effect of unlawful search".

The balance between crime control and due process is always shifting. In Zimbabwe the emphasis is on control of crime, as it has been for most of the country's history; individual rights are generally subordinated to the need to control crime. The new constitution, with its emphasis on individual rights, may swing the balance towards due process.

### ***Adversarial and inquisitorial systems of criminal procedure***

In Zimbabwe we have adopted what is called an adversarial (or accusatorial) system of criminal procedure. In many other countries, particularly France, Germany and other countries on the European continent, there is an inquisitorial system.

#### **Adversarial (or accusatorial) system**

In an adversarial or accusatorial system of criminal procedure, the judicial officer's role is largely that of a detached referee or umpire who presides over a contest between the prosecution and the defence and who does not actively participate in the contest for fear of becoming partial or losing perspective. The police are the primary investigative force and collect evidence to be used in the trial against the accused. They pass the evidence to the prosecution in the form of a file called a police docket, which contains written statements made by prospective witnesses. The prosecutor decides what charges to bring against the accused person and what evidence to lead in order to establish the State case against him, in particular which witnesses to call; because of this, the prosecutor is called "*dominus litis*" (master of the proceedings). A criminal trial takes the form of a contest between the prosecution and the defence, who in turn call their own witnesses, lead them through their evidence and cross-examine the witnesses called by the other side.

## Inquisitorial system

In an inquisitorial system, the presiding judicial officer is much more actively involved in producing and presenting the evidence.

In cases involving serious or complex crimes, an investigating judge or magistrate decides what evidence should be collected, orders searches, and questions the witnesses and the suspect. The investigating judge or magistrate is independent of the Executive, and therefore separate from the prosecutors office; his or her role is that of an investigator not a prosecutor, and he or she supposed to collect all evidence both incriminating and exculpatory. If the investigating judge or magistrate considers there is a valid case against the suspect, the suspect will be sent for trial. The investigating judge or magistrate will prepare a dossier outlining all aspects of the case; this dossier forms the basis of the trial.

At the trial, the presiding judge or magistrate (not normally the same judge or magistrate who collected the evidence) directs the proceedings and dominates the questioning of witnesses and the accused. The judge or magistrate is required to continue the trial until he or she has ascertained the truth.

## Main differences between the two systems<sup>73</sup>

The main distinctions between the two systems are:

- *Gathering of evidence:* In adversarial systems, the responsibility for gathering evidence rests mainly with the parties, i.e. the State and the defence. In inquisitorial systems, on the other hand, the gathering of evidence is overseen by an independent investigating officer (usually a judge or magistrate).
- An adversarial system proceeds on the basis that the best way of avoiding erroneous verdicts of guilt is to allow the defence to test and counter the State's evidence at the trial, and to give the defence the freedom to decide how to do this. In that sense, it may be said that an adversarial model is based on distrust of the reliability of the State's evidence. The trial is the exclusive forum for deciding whether there is a reasonable doubt as to the accused's guilt. In an inquisitorial system, on the other hand, has more faith in the integrity of the pre-trial processes, i.e. in the ability of the investigating judge or magistrate to distinguish between reliable and unreliable evidence, to detect flaws in the prosecution case and to identify evidence that is favourable to the defence case. By the time a case reaches trial there is a greater presumption of guilt.
- The parties — the prosecution and the defence — generally have more discretion in adversarial systems. The prosecution formulates the charge, both parties decide what evidence they are going to produce, the prosecutor can withdraw charges at any time and the accused can decide whether to plead guilty or not guilty. In inquisitorial systems, on the other hand, the discretion is more limited. In some systems, at least in theory, a prosecution must take place in all cases where there is sufficient evidence of guilt, and traditionally there was no such thing as a plea of guilty: regardless of the accused's wishes the trial proceeded, though sometimes in a more abbreviated form.
- In an adversarial system the parties determine the evidence to be led at the trial while the role of the presiding judicial officer is to ensure that the trial proceeds according to the rules of evidence and criminal procedure, and then to weigh up the evidence to decide whether the prosecution has proved the accused's guilt beyond a reasonable doubt. In an inquisitorial system, on the other hand, the conduct of the trial is largely in the

---

<sup>73</sup> This is taken from a discussion paper, "Adversarial and Inquisitorial Systems: A Brief Overview of Key Features", by the Law Commission of New Zealand.

hands of the presiding judge or magistrate. He or she determines which witnesses are to be called and assumes the dominant role in questioning them. Cross-examination is largely unknown, though the parties are usually entitled to ask questions.

- In an adversarial system there are strict rules determining what evidence may be led at the trial, to prevent the judicial officer being misled or prejudiced. In an inquisitorial system the court is given more information about the case, and the rules of evidence are more flexible. The accused's criminal history, for example, may be read to the court before the trial begins.

### ***Criminal procedure as a system***

The law of criminal procedure operates as a system or process, step by step from the investigation of a crime, the arrest of a suspect, the trial of the suspect, his conviction and sentence and subsequent appeal. Each stage of the process affects the subsequent stages. For example, if a suspect is coerced into making a confession this will affect the outcome of his trial if the confession is ruled inadmissible in evidence.

Standards of proof vary at different stages of the system, getting more onerous for the State as the case progresses:

- In the pre-trial stages, the general criterion for interfering with individual liberties is reasonable grounds (as to which, see above). So for an arrest to be effected, reasonable grounds for suspicion are normally required.
- At the bail stage, considerations such as the dangers of flight ("abscondment"), tampering with witnesses or committing further crimes are relevant.
- At the end of the State case, the court must decide whether the prosecution has presented a *prima facie* case to prove each element of the crime; if not, the accused person should be discharged.
- At the end of the trial, the burden of proving the accused person's guilt beyond a reasonable doubt rests on the prosecution.

The process is one in which many cases fail to reach the end, namely conviction and sentence of a criminal. Thus of the thousands of cases that are reported to the Police, some will be abandoned by the Police without investigation (since they are regarded as spurious complaints); more will be abandoned after investigation has failed to produce adequate evidence; in others the public prosecutor will decline to prosecute; in others, which come to trial, the accused person will be acquitted or will be found to be mentally disordered.

This has policy implications. If there is concern at the unacceptably high crime rate, increased State intervention in the earlier stages of the process will be more effective than changes to the later stages (since more cases will be affected). Hence better detection, more road-blocks and so on will have a greater effect in reducing vehicle theft than merely increasing the punishment of some convicted thieves at the end of the process. Crime prevention or deterrence, in other words, is more effective than increasing the severity of punishment.

### ***Remedies***

If State officials exceed their powers, for example by wrongfully detaining a suspect, there are several remedies open to an aggrieved person:

### Interdict *de libero homine exhibendo* (*habeas corpus*)

This is a remedy against unlawful detention, and is specifically provided for in section 50(7) of the Constitution. The High Court is asked for an order that the respondent (the detaining authority) produce a detained person before the court at a certain date and time; the order is coupled with a provisional order (a rule *nisi*) that the respondent must show cause why the detainee should not be released. The order is applied for by way of a civil application which may be in the form of a chamber application. Traditionally, the court would not examine carefully the *locus standi* of the person who applied for the interdict; it merely had to be satisfied that the applicant had a good reason for making the application and that the detained person would have made such an application had it been in his power to do so.<sup>74</sup> Now section 50(7) of the Constitution goes further and states that “any person” may approach the High Court for an order of *habeas corpus*. The applicant must show the court there are *prima facie* reasons for believing that the detention is wrongful, but once the order is granted the detaining authority bears the onus of showing that the detention is lawful.

### Ordinary interdict

This is an order of court prohibiting a person from acting in a certain way. It can be fruitfully employed to protect the rights of detainees in criminal proceedings, when *habeas corpus* is not appropriate.

### Mandamus

This is the opposite of an interdict; it is a court order that a person should perform his or her duty (e.g. that a prosecutor should furnish an accused person with particulars relating to the charge).

### Civil action for damages

If a police officer or other authority acts illegally and causes loss or injury to an accused person, an action for damages may be instituted against that officer or authority. For example, if a person has been wrongly arrested and detained, he has an action for damages not only against the State but also against the authority that arrested or detained him.<sup>75</sup>

The right of a person to compensation for unlawful arrest or detention is protected by section 50(9) of the Constitution.

### The exclusion of evidence

Evidence that has been obtained illegally may be treated as inadmissible in a criminal trial.<sup>76</sup> For example, a confession that has been obtained through force or threats will not be admitted in evidence.

---

<sup>74</sup> See *Wood & Ors v Ondangwa Tribal Authority & Anor* 1975 (2) SA 294 (A). The interest that a person might have in the liberty of another could arise not only through family relationship or personal friendship but also through the relationship that may bind the two persons through an agreement relating to a matter of common interest, such as membership of a society, or a church, or a political party. Any member of such a society or body would have an interest in the personal liberty of a co-member (headnote to *Wood's* case).

<sup>75</sup> Note, however, that judicial officers generally cannot be sued for damages if they give wrong judgments or orders, unless they are shown to have acted for some wrongful or improper motive: McKerron *Law of Delict* 7th ed pp 81-2.

<sup>76</sup> Cf *Kelly v Pickering & Anor (1)* 1980 ZLR 44 (G) at 45. And see section 70(3) of the Constitution, mentioned earlier.

## 2. JURISDICTION OF THE COURTS

“Jurisdiction” in these notes means the power of a court try criminal cases, that is to say the court’s power to inquire into and determine whether or not a person is guilty of a crime and to impose punishment on him if he is found to be guilty.<sup>1</sup>

The courts which have jurisdiction in criminal cases are magistrates courts, the High Court, the Supreme Court and the Constitutional Court. No other court or tribunal may be given criminal jurisdiction beyond what may be necessary to enforce discipline in disciplined forces such as the Defence Forces and the Police Service.<sup>2</sup>

### Magistrates courts

Magistrates courts are divided into regional courts and provincial courts. Regional courts are the more senior. All magistrates are appointed by the Judicial Service Commission.<sup>3</sup>

#### ***Territorial jurisdiction***

Regional magistrates courts are established for specific regional divisions. There are three regional divisions, the Eastern Division (centred in Harare), the Central Division, and the Western Division (centred in Bulawayo). Provincial magistrates courts are established for specific provinces, and magisterial provinces follow the boundaries of the administrative provinces.

All magistrates courts have criminal jurisdiction within the regional division or province for which they are established, and in certain circumstances they may try cases that occur outside it, e.g.:

- If a person does something outside Zimbabwe which is a crime under a statute which has extra-territorial effect, any magistrates court can try that crime even if no element of the crime took place within the court’s division or province.<sup>4</sup>
- If any element of a crime is committed within a division or province, the court of that division or province can try the crime even if the rest of the crime was committed elsewhere.<sup>5</sup>
- If a crime is committed within five kilometres from the boundary of a division or province, or on a vehicle or train which is passing through a division or province or within five kilometres of a division or province, the court of that division or province may try the crime.<sup>6</sup>
- A person charged with theft or receiving property knowing it to be stolen, or obtaining property by means of a crime, can be tried by any court within whose division or province he has had possession of any of the property.<sup>7</sup>

---

<sup>1</sup> See Reid Rowland *Criminal Procedure in Zimbabwe* p. 1-7.

<sup>2</sup> Section 193 of the Constitution.

<sup>3</sup> Section 7(1) of the Magistrates Court Act [*Chapter 7:10*] as amended by the Judicial Service Act [*Chapter 7:18*].

<sup>4</sup> Section 56(6) of the Magistrates Court Act [*Chapter 7:10*].

<sup>5</sup> Section 56(3) of the Magistrates Court Act [*Chapter 7:10*].

<sup>6</sup> Section 56(2)(a) & (b) of the Magistrates Court Act [*Chapter 7:10*].

<sup>7</sup> Section 56(4) of the Magistrates Court Act [*Chapter 7:10*].

- A person charged with incitement (i.e. with being an accomplice) or with being an accessory after the fact to a crime (the old term for what is now an accessory) may be tried by any court which can try the person who committed the crime concerned.<sup>8</sup>
- If it is uncertain in which of several jurisdictions a crime has been committed, the offender may be tried in any of them.<sup>9</sup>
- With the accused person's consent, the Prosecutor-General may direct that a trial should be held in any division or province.<sup>10</sup>

### **Crimes that may be tried in a magistrates court**

Magistrates courts do not have power to try all crimes:

2. No magistrate can try the crimes of murder, treason or any other crime for which the death penalty may be imposed.<sup>11</sup> Note that magistrates can try attempted murder.<sup>12</sup>
3. Only regional magistrates may try the crime of rape, unless:
  - the Prosecutor-General has remitted the case for trial or sentence to a magistrate who is not a regional magistrate; or
  - the accused is a juvenile under the age of 18 and the Prosecutor-General has authorised the trial to be held before a magistrate who is not a regional magistrate.<sup>13</sup>

Magistrates other than regional magistrates can however try cases of attempted rape.<sup>14</sup>

### **Magistrates' jurisdiction as to punishment**

The extent of a magistrate's jurisdiction as to punishment varies according to the grade of the magistrate concerned.

Regional magistrates:

In most cases the maximum sentence that a regional magistrate can impose on a convicted person is a fine of level 12 or imprisonment for ten years, or both.<sup>15</sup>

That is the ordinary jurisdiction of regional magistrates. In certain cases they can impose higher sentences:

---

<sup>8</sup> Section 56(5) of the Magistrates Court Act [*Chapter 7:10*]. An accessory after the fact is now known merely as an accessory (i.e. a person who assists an actual perpetrator after the crime has been committed): see section 206 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The reference to a person charged with incitement seems to be erroneous, since if the crime which has been incited is committed, the inciter is guilty of that crime, not incitement.

<sup>9</sup> Section 56(8) of the Magistrates Court Act [*Chapter 7:10*].

<sup>10</sup> Section 56(9) of the Magistrates Court Act [*Chapter 7:10*].

<sup>11</sup> Section 49(1) of the Magistrates Court Act [*Chapter 7:10*]. Under section 48 of the Constitution the death penalty can be imposed only for murder committed in aggravating circumstances. Hence statutory provisions which allow that penalty to be imposed for other crimes are unconstitutional. The provisions concerned are: section 20 of the Criminal Law Code (which purportedly allows the death penalty to be imposed for treason); section 23 of the Code (which allows it to be imposed for insurgency, banditry, sabotage or terrorism); section 4 of the Genocide Act [*Chapter 9:20*] (which allows it to be imposed for genocide); and section 3 of the Geneva Conventions Act [*Chapter 11:06*] (which allows it to be imposed for committing a grave breach of one of the Geneva Conventions).

<sup>12</sup> See *S v M* 1980 (1) SA 881 (O). Attempts to commit treason constitute the substantive crime of treason.

<sup>13</sup> Section 49(2) of the Magistrates Court Act [*Chapter 7:10*].

<sup>14</sup> *S v M* 1980 (1) SA 881 (O).

<sup>15</sup> Section 50(4) of the Magistrates Court Act [*Chapter 7:10*]. Level 12 is currently \$3 000.

- In cases of public violence, malicious damage to property or aggravated robbery, their jurisdiction is increased to a maximum of a fine of level 13 or 12 years' imprisonment, or both.<sup>16</sup>
- In cases of theft, stock theft and unlawful entry into premises, they can impose the maximum sentence prescribed for those crimes in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the "Criminal Law Code").<sup>17</sup>
- For a sexual crime (rape, indecent assault, an unnatural crime, etc), they can impose a fine of up to level 14 or up to 20 years' imprisonment, or both.<sup>18</sup>
- For the crime of deliberately infecting someone with a sexually transmitted disease (other than HIV) they can impose a fine of "up to or exceeding"<sup>19</sup> level 14 or up to five years' imprisonment, or both.<sup>20</sup>
- For the crime of deliberately infecting someone with HIV, they can impose up to 20 years' imprisonment.<sup>21</sup>
- For crimes relating to dangerous drugs specified in Chapter VII of the Criminal Law Code, they can impose a fine up to level 13 or up to 15 years' imprisonment.<sup>22</sup>

### Provincial magistrates

In most cases the maximum sentence that a provincial magistrate can impose on a convicted person is a fine of level 10 or imprisonment for five years, or both.<sup>23</sup> That is the ordinary jurisdiction of provincial magistrates. In certain cases they can impose higher sentences:

- In cases of public violence or malicious damage to property, the jurisdiction is increased to a maximum of a fine of level 11 or seven years' imprisonment, or both.<sup>24</sup>
- In cases of theft, stock theft and unlawful entry into premises, they can impose the maximum sentence prescribed for those crimes in the Criminal Law Code.<sup>25</sup>

---

<sup>16</sup> Section 51(2) of the Magistrates Court Act [*Chapter 7:10*]. Level 13 is currently \$5 000.

<sup>17</sup> Section 51(3) of the Magistrates Court Act [*Chapter 7:10*]. The maximum sentence for theft is a fine of level 14 or twice the value of the stolen property, or 25 years' imprisonment, or both (section 113 of the Code); for stock theft it is a mandatory minimum nine to 25 years' imprisonment, where cattle or horses were stolen, or the same sentence as for theft where other animals were stolen (section 114 of the Code); and for unlawful entry into premises, it is a fine of level 13 (or twice the value of any property stolen) or 15 years' imprisonment, or both, where the crime was committed in aggravating circumstances, and a fine of level 10 (or twice the value of any stolen property) or 10 years' imprisonment, or both, in other cases (section 131 of the Code).

<sup>18</sup> Section 51(4) of the Magistrates Court Act [*Chapter 7:10*]. Level 14 is currently \$10 000.

<sup>19</sup> Whatever that means!

<sup>20</sup> Section 51(4)(b) of the Magistrates Court Act [*Chapter 7:10*], as read with section 78 of the Criminal Law Code.

<sup>21</sup> Section 51(4)(b) of the Magistrates Court Act [*Chapter 7:10*] as read with section 79 of the Criminal Law Code.

<sup>22</sup> Section 51(4)(d) of the Magistrates Court Act [*Chapter 7:10*].

<sup>23</sup> Section 50(3) of the Magistrates Court Act [*Chapter 7:10*].

<sup>24</sup> Section 51(1) of the Magistrates Court Act [*Chapter 7:10*].

<sup>25</sup> Section 51(3) of the Magistrates Court Act [*Chapter 7:10*]. For the sentences that may be imposed for these offences, see footnote 17 above.

- For crimes relating to dangerous drugs specified in Chapter VII of the Criminal Law Code, they can impose a fine up to level 12 or up to 10 years' imprisonment.<sup>26</sup>

### Senior magistrates

In most cases the maximum sentence that a senior magistrate can impose on a convicted person is a fine of level 9 or imprisonment for four years, or both.<sup>27</sup> In certain cases, however senior magistrates can impose higher sentences:

- In cases of public violence or malicious damage to property, the jurisdiction is increased to a maximum of a fine of level 11 or seven years' imprisonment, or both.<sup>28</sup>
- In cases of theft, stock theft and unlawful entry into premises, they can impose the maximum sentence prescribed for those crimes in the Criminal Law Code.<sup>29</sup>
- For crimes relating to dangerous drugs specified in Chapter VII of the Criminal Law Code, they can impose a fine up to level 12 or up to 10 years' imprisonment.<sup>30</sup>

### Ordinary magistrates

In most cases, the maximum sentence that a magistrate, other than a regional, provincial or senior magistrate, can impose on a convicted person varies according to whether the Prosecutor-General has remitted the case to him or whether the convicted person was tried summarily. In remitted cases the maximum sentence is a fine of level 9 or imprisonment for four years, or both; on summary trial, the maximum sentence is a fine of level 7 or imprisonment for two years, or both.<sup>31</sup> In certain cases, ordinary magistrates can impose higher sentences:

- In cases of public violence or malicious damage to property, the jurisdiction is increased to a maximum of a fine of level 11 or seven years' imprisonment, or both.<sup>32</sup>
- In cases of theft, stock theft and unlawful entry into premises, they can impose the maximum sentence prescribed for those crimes in the Criminal Law Code.<sup>33</sup>
- For crimes relating to dangerous drugs specified in Chapter VII of the Criminal Law Code, they can impose a fine up to level 12 or up to 10 years' imprisonment.<sup>34</sup>

All magistrates are permitted by section 50(6) of the Magistrates Court Act [*Chapter 7:10*] to impose up to six cuts on convicted juveniles. This, however, is unconstitutional in that the judicial corporal punishment of juveniles is a cruel and inhuman punishment and therefore unconstitutional, according to the Constitutional Court in the case of *S v Chokuramba* CCZ 10/2019.

---

<sup>26</sup> Section 51(4)(c) of the Magistrates Court Act [*Chapter 7:10*].

<sup>27</sup> Section 50(2) of the Magistrates Court Act [*Chapter 7:10*].

<sup>28</sup> Section 51(1) of the Magistrates Court Act [*Chapter 7:10*].

<sup>29</sup> Section 51(3) of the Magistrates Court Act [*Chapter 7:10*]. For the sentences that may be imposed for these offences, see footnote 17 above.

<sup>30</sup> Section 51(4)(c) of the Magistrates Court Act [*Chapter 7:10*].

<sup>31</sup> Section 50(4) of the Magistrates Court Act [*Chapter 7:10*].

<sup>32</sup> Section 51(1) of the Magistrates Court Act [*Chapter 7:10*].

<sup>33</sup> Section 51(3) of the Magistrates Court Act [*Chapter 7:10*]. For the sentences that may be imposed for these offences, see footnote 17 above.

<sup>34</sup> Section 51(4)(c) of the Magistrates Court Act [*Chapter 7:10*].

If a magistrate, having convicted an accused person of a crime, considers that an appropriate sentence would be beyond his jurisdiction, he should transfer the case to the High Court for sentence.

## The High Court

### ***Original jurisdiction***

The High Court sits permanently in Harare, Bulawayo and Masvingo, and Judges of the High Court go on circuit three times a year to Mutare, Gweru and Hwange.<sup>35</sup> Permanent High Courts are planned for Mutare and Gweru.

The High Court has full criminal jurisdiction over all persons and criminal matters in Zimbabwe.<sup>36</sup> That means that, wherever it is sitting, it can try all crimes throughout Zimbabwe, and may impose any lawful punishment on convicted persons. So the High Court sitting in Harare, for example, can try persons for crimes committed in Bulawayo — though in practice crimes committed in the western half of the country are tried by the High Court in Bulawayo.

The High Court also has jurisdiction over extra-territorial crimes, where the statute that creates the crime concerned has extra-territorial operation. It can also exercise jurisdiction over crimes committed wholly or partly outside Zimbabwe, in terms of section 5 of the Criminal Law Code:

- if the conduct which completed the crime took place in Zimbabwe;
- if the crime is against public security in Zimbabwe or the safety of the State in Zimbabwe; or
- if the crime has produced, or was intended to produce, a harmful effect in Zimbabwe, or was committed with the realisation that there was a real risk or possibility that it might produce such an effect.<sup>37</sup>

Although, as we have seen, magistrates courts have jurisdiction to try crimes under a statute which has extra-territorial operation, they cannot try crimes in terms of section 5 of the Criminal Law Code, i.e. crimes that are not expressly extra-territorial but which are committed outside Zimbabwe or were intended to have a harmful effect in Zimbabwe.

### ***Review jurisdiction***

The High Court has power to review all proceedings and decisions of all inferior courts in Zimbabwe. The exercise of its review powers in criminal cases will be dealt with later. Note, however, that the High Court cannot review sentences which Parliament imposes on its members (or even, presumably, on other people) for contempt, even though Parliament is sitting as a court.<sup>38</sup>

---

<sup>35</sup> That is to say, judges travel to those centres to try cases.

<sup>36</sup> Section 23 of the High Court Act [*Chapter 7:06*].

<sup>37</sup> Section 5(1)(c)(ii) of the Criminal Law Code; see also *S v Mharapara* 1985 (2) ZLR 211 (S).

<sup>38</sup> See *Bennett v Parliament of Zimbabwe* 2005 (1) ZLR 155 (H) and *Bennett v Mhangagwa NO & Ors* 2006 (1) ZLR 218 (S). Parliament can now impose only a fine for contempt (sec 148(2) of the Constitution).

### ***Appellate jurisdiction***

The High Court has power to hear appeals from decisions of magistrates in criminal cases, both in regard to conviction and sentence.<sup>39</sup>

### **The Supreme Court**

The Supreme Court is the final court of appeal in Zimbabwe, with power to hear and determine appeals in criminal cases from any court or tribunal from which, in terms of any enactment, an appeal lies to the Supreme Court.<sup>40</sup> In criminal cases, this means that appeals against decisions of the High Court lie to the Supreme Court.

### **The Constitutional Court**

The Constitutional Court is the highest court in all constitutional matters, and only decides constitutional matters and issues connected with decisions on constitutional matters.<sup>41</sup> It only deals with criminal cases, therefore, to the extent that they involve constitutional issues.

Until 2020 the judges of the Supreme Court constitute the Constitutional Court.<sup>42</sup>

---

<sup>39</sup> Section 60 of the Magistrates Court Act [*Chapter 7:10*].

<sup>40</sup> Section 9(1) of the Supreme Court Act [*Chapter 7:13*].

<sup>41</sup> Section 167(1) of the Constitution. The phrase “constitutional matter” is defined in section 332 of the Constitution as a matter [i.e. a case] in which there is an issue involving the interpretation, protection or enforcement of the Constitution.

<sup>42</sup> Para 18(2) of the Sixth Schedule to the Constitution.

### 3. THE POLICE AND THEIR POWERS

#### Who are the Police?

The Police Service (the Zimbabwe Republic Police) is established by section 219 of the Constitution, with the function of “detecting, investigating and preventing crime”. It consists of a Regular Force (the main, permanent force), a Police Constabulary (formerly the Police Reserve), and ancillary members. Members of the Police Constabulary and ancillary members, when on duty, have the same powers as members of the Regular Force.<sup>1</sup> The Police Service is under the command of the Commissioner-General of Police, appointed by the President after consultation with the Minister responsible for the Police Service.<sup>2</sup> The Commissioner-General can be removed from office by the President for any reason, after consultation with the Minister.<sup>3</sup>

#### ***Police officers/peace officers***

The term “police officer” (a member of the ZRP) must be distinguished from “peace officer”, which is a term used in the Criminal Procedure and Evidence Act to denote police officers and other persons who are given most of the powers of a police officer.

The following persons are peace officers (the list is not exhaustive):

- police officers;
- members of the close security unit attached to the Cabinet Office;
- members of the Central Intelligence Organisation (CIO);
- magistrates and justices of the peace;
- the Sheriff and deputy sheriffs (but not, curiously, messengers of the magistrates court);
- officers of the Zimbabwe Anti-Corruption Commission;
- prison officers;
- immigration officers
- inspectors of mines
- parks officers, within national parks and other areas under the control of the Parks and Wild Life Management Authority; and
- vehicle inspectors under the Road Traffic Act.
- chiefs, headmen, village heads and chiefs’ and headmen’s messengers, within their areas of jurisdiction;

#### Interrogation by the Police<sup>4</sup>

Obviously, if the Police are to carry out their function of controlling crime, they must be able to question suspects and witnesses in order to obtain information; equally obviously, their power to question or interrogate people must be carefully controlled to prevent abuse.

---

<sup>1</sup> Sections 27(4) and 26(3) of the Police Act [*Chapter 11:10*].

<sup>2</sup> Section 221 of the Constitution.

<sup>3</sup> Section 7 of the Police Act [*Chapter 11:10*] as read with section 340 of the Constitution.

<sup>4</sup> What follows owes a good deal to Joubert & Geldenhuys *Criminal Procedure Handbook* 2nd ed p. 101 ff.

The Police do not need any specific statutory power to ask people questions; anyone can do that. But unless the Police are given power to demand answers, anyone is free to remain silent when the Police put questions to them, because there is no general duty on the public to give the police information concerning the commission of a crime.<sup>5</sup> It must be remembered, too, that suspects who have been arrested have a right to remain silent, and must be informed promptly of this right and of the consequences of exercising it.<sup>6</sup> Furthermore, if they have been arrested or are being detained, they must be informed of their right to consult in private with a legal practitioner of their choice — and of course they must be allowed to exercise that right.<sup>7</sup>

To what extent can the Police question or interrogate suspects, particularly suspects who have been arrested and are in detention? This was considered in the South African case of *Gosschalk v Rossouw* 1966 (2) SA 476 (C), where a detainee sought an interdict preventing the Police from interrogating him. At pages 492-3, Corbett J (as he then was) said:

“I consider that police interrogation should be limited to that which is necessary for the investigation of the offence or alleged offence in question and that, in extent, it should not exceed what is reasonable in all the circumstances of the case. In determining what is reasonable in a particular case the Court must seek to reconcile two competing interests, viz. (i) that of the individual to be protected from illegal or irregular invasions of his liberties by the authorities, and (ii) the interest of the State to secure information and evidence relating to crimes which have been committed so that justice may be properly administered. ... Neither of these two interests should be allowed to wholly displace the other. It is the duty of the Court to ensure that a fair balance between them is maintained and the basic criterion must be the test of reasonableness as applied to the particular facts of the case.

“... Obviously they [the Police] are not entitled, in order to induce a detainee to speak, to subject him to any form of assault or to cause his health or resistance to be impaired by inadequate food, lack of sleep, living conditions or the like. Nor may they resort to methods of interrogation commonly referred to as the ‘third degree’. ... In this context I understand the term ‘third degree’ to refer to a severe and prolonged cross-questioning designed to overcome the powers or resistance of the person being interrogated. Furthermore, in cases where the person being interrogated is himself suspected of having committed a crime, he cannot be required to incriminate himself under interrogation ...

“On the other hand, I do not think that the consent of the person to be interrogated is a necessary pre-requisite to interrogation. Circumstances may well render it perfectly reasonable for the interrogation to be persisted in even though the person concerned refuses to answer questions. Thus the police might wish to exercise a moderate degree of moral persuasion in the hope that the person concerned might change his mind and become co-operative. The difference between this approach and the third-degree method is, of course, largely one of degree and the dividing line can only be the criterion of reasonableness: the difference is nevertheless a very real one.”

A further requirement was added in *S v Slatter & Ors* 1983 (2) ZLR 144 (H) at 166, where Dumbutshena JP (as he then was) said, “If an accused person wants a legal practitioner before, or during, interrogation, the police investigators must stop their investigations [*sic*: he

---

<sup>5</sup> There are specific instances where the law imposes a duty on members of the public to give such information. For example, a citizen of Zimbabwe who knows that someone is trying to overthrow the Government will be guilty of concealing treason if he or she does not inform an official (section 21 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]). And in terms of section 26 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] a person whom a peace officer reasonably suspects of having committed a crime must supply the peace officer with his or her name and address when called upon to do so.

<sup>6</sup> Section 50(4)(a) & (b) of the Constitution.

<sup>7</sup> Section 50(1)(b)(ii) and 50(5)(b) of the Constitution.

meant “interrogation”] and only resume after the accused has had consultations with his legal practitioner.”

Under section 39A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] people who voluntarily go to a police station without having been arrested are entitled to leave the station whenever they wish unless they are then arrested. If they are arrested at the police station they must be told of that fact and then they are of course entitled to all the rights of persons under arrest, such as the right to contact their relatives and lawyers, and so on.

Under section 54(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a police officer may enter premises without a warrant, in order to interrogate a person whom the officer reasonably suspects may furnish information regarding a crime or an alleged crime. An officer may not, however, enter a dwelling without the consent of the occupier.

### **Judges’ Rules**

In England and South Africa there are codes of conduct to guide the police in their dealings with suspects. In South Africa they are known as the Judges’ Rules; in England the former judges’ rules (dating from 1913) have been replaced by Code C Code of Practice issued by the Home Secretary under the Police and Criminal Evidence Act 1984.

The South African Judges’ Rules were drawn up at a judges’ conference in 1931.<sup>8</sup> They include the following admonitions:

- The police may put questions to people who are not suspects without cautioning them.
- The police must caution a person who has become a suspect before they put questions to the person.
- Questions should not be put to a person in custody, unless he or she is making a voluntary statement in which case questions can be put to clarify what he or she is saying, i.e. to remove elementary or obvious ambiguities.

The rules do not have the force of law in South Africa but are merely administrative directions designed for the guidance of the police and the better administration of justice. On the other hand, if the police disregard the guidelines when questioning suspects, they run the risk that any statements the suspects make in answer to the questions may be ruled inadmissible. The rules have been largely ignored for many years but in any event, they have to some extent been superseded by the stringent constitutional provisions protecting the right to silence.

No such rules exist in Zimbabwe, although they may be useful as laying down a standard of conduct to be expected of the police.<sup>9</sup>

### **Taking of bodily samples from persons**

Section 41B of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides for the taking of bodily samples<sup>10</sup> from one or more persons at the request of a peace officer who is satisfied that there are reasonable grounds for believing that any of the persons has committed a crime and that the bodily sample, when analysed, will be of value in the investigation of the crime by eliminating or including any of them as suspects. If a person does not con-

---

<sup>8</sup> The rules are set out in Gardiner & Lansdown *SA Criminal Law and Procedure* 6th ed vol 1 pages 613-4.

<sup>9</sup> *R v Hackwell & Ors* 1965 RLR 1 (A) at 17; *R v Tapeson* 1965 RLR 146 (A).

<sup>10</sup> A bodily sample is defined in section 2 of the Criminal Procedure and Evidence Act as an intimate or buccal sample. A buccal sample is a sample of saliva, but there is no definition of “intimate sample”.

sent to the taking of a bodily sample, a police officer of or above the rank of inspector may apply to a judge or magistrate for a warrant. Although the section does not say this specifically, it is implied that the warrant will authorise the compulsory taking of a bodily sample from the person concerned.

Bodily samples taken from a person who is later charged with a crime must be destroyed if the person is acquitted or the charge is withdrawn. Samples taken from persons who are not charged with a crime must be destroyed on the conclusion of the criminal proceedings for which they were taken.<sup>11</sup>

---

<sup>11</sup> Section 41B(5) of the Criminal Procedure and Evidence Act.

## 4. SECURING THE ATTENDANCE OF THE ACCUSED AT HIS TRIAL

The first stage in the procedural process is to get the accused person to trial. There are five lawful ways to do this: arrest and remand; summons; warning by the court; written notice to appear (e.g. a traffic ticket); and extradition.

### A. Arrest and Remand

Arrest is dealt with in Part V of the Criminal Procedure and Evidence Act.

There are six essentials or bases upon which an arrest, and detention following arrest, will be lawful:<sup>1</sup>

1. The arrest must have been properly authorised; i.e. it must be authorised by statute.
2. The arrest must be reasonable (we shall come to this requirement later).
3. The arresting officer must exercise physical control over the person arrested (“the suspect”); he must limit the suspect’s freedom of movement. An arrest is made by touching or confining the body of the person who is being arrested, i.e. by the arresting officer placing his hand on the suspect, usually on his shoulder, and telling him he is under arrest<sup>2</sup> (An arresting officer must of course be gender sensitive in this, particularly where he is male and is arresting a female person). Touching or confining a suspect’s body is not necessary if the suspect voluntarily submits to the arresting officer’s control. Sometimes, if the suspect does not submit to arrest, it is necessary to subdue him, e.g. by handcuffing him, but any force used must be reasonable and proportionate (we shall deal with this later).
4. The suspect must be informed of the reasons for the arrest. According to section 50(1)(a) of the Constitution this must be done “at the time of arrest”; in terms of section 32(5) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], it must be done “forthwith”, i.e. within a reasonable time after arrest, and under section 41A(1) of the Act it must be done “promptly”. The constitutional provision prevails, so suspects must be given this information when they are being arrested. A suspect’s custody will be unlawful if this requirement is not complied with. The extent to which reasons must be given will depend on the circumstances of each case, though the Tenth Schedule to the Criminal Procedure and Evidence Act sets out a form of words which should “guide” peace officers as to what they should tell suspects (see section 41A(4) of the Act).
5. The suspect must also be informed of his or her right to remain silent and of the consequences of remaining silent, and of their right to contact a lawyer, a medical practitioner, a relative or anyone else of their choice.<sup>3</sup> If an arrested person does not succeed in contacting a lawyer or other person at the first attempt, he or she must be allowed to go on trying until contact is made.<sup>4</sup>
6. The suspect must be taken to the appropriate authorities as soon as possible. In the case of an arrest without warrant, that means he must be brought to a police station.<sup>5</sup> Thus,

---

<sup>1</sup> See Joubert & Geldenhuys *Criminal Procedure Handbook* 10th ed p. 118.

<sup>2</sup> Section 41 of the Criminal Procedure and Evidence Act.

<sup>3</sup> Section 50(5)(c) of the Constitution and section 41A(1) of the Criminal Procedure and Evidence Act.

<sup>4</sup> Section 41A(3) of the Criminal Procedure and Evidence Act.

<sup>5</sup> Section 32 of the Criminal Procedure and Evidence Act.

where a suspect was held for 20 hours at a place five kilometres from a police station, pending investigation into a theft, the detention was held to be unlawful.<sup>6</sup>

Arrest involves a deprivation of liberty, so it is essential that correct procedures are adopted when an arrest is made. If they are not, the arrest is unlawful and the arrester and his employer are liable for damages. All arrests without warrant are *prima facie* unlawful, and the onus is on the arrester to justify the arrest.<sup>7</sup>

There are two kinds of arrest: arrest that takes place without a warrant, and arrest with a warrant. Usually police officers or peace officers effect arrests. In limited circumstances civilians may arrest without a warrant.

### **Arrest without a warrant**

A peace officer is authorised by the Criminal Procedure and Evidence Act [*Chapter 9:07*] to arrest without warrant:<sup>8</sup>

- every person who commits a crime (however trivial) in his presence or whom he finds attempting to commit a crime or clearly showing an intention to commit a crime;<sup>9</sup>
- every person whom he has reasonable grounds for suspecting of committing or being about to commit a crime contained in the First or Ninth Schedules to the Criminal Procedure and Evidence Act.<sup>10</sup> These crimes are:

#### *First Schedule:*

- any crime at common law (there are no such crimes now, except those that were committed before the commencement of the Criminal Law Code<sup>11</sup>);
- any statutory crime for which a punishment of more than six months' imprisonment without the option of a fine is prescribed in the statute concerned;
- a conspiracy, incitement or attempt to commit any of the above crimes, or being an accessory (after the fact) to any such crime.

#### *Ninth Schedule:*

- bribery and corruption under the Criminal Law Code;
- money-laundering under section 63 of the Serious Offences (Confiscation of Profits) Act [*Chapter 9:17*];
- illegally exporting maize or other controlled product in contravention of the Grain Marketing Act [*Chapter 18:14*];
- unlawfully possessing or dealing in, precious metals or precious stones;
- crimes involving dangerous drugs, except the possession of cannabis;
- fraud or forgery—
  - involving prejudice or potential prejudice to the State, unless the amount of prejudice is less than a prescribed amount; or

---

<sup>6</sup> *Ezekiel v Kynoch* NPD 13.4.1923, cited in Geldenhuys & Joubert *Criminal Procedure Handbook 10th ed p. 119*.

<sup>7</sup> *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (H).

<sup>8</sup> Section 25 of the Criminal Procedure and Evidence Act.

<sup>9</sup> Section 25(1)(a) & (c) of the Criminal Procedure and Evidence Act. See *R v Vengayi* 1955 R & N 355 (SR)

<sup>10</sup> Section 25(1)(b) of the Criminal Procedure and Evidence Act.

<sup>11</sup> The Code came into operation on the 1st July, 2006 (SI 152 of 2006).

- committed by a group of conspirators; or
- involving prejudice or potential prejudice greater than a prescribed amount;
- forging banknotes or coins;
- committing certain exchange control crimes;
- theft of a motor vehicle;
- theft or forgery of national identity documents, passports, drivers licences, immigration permits, vehicle registration certificates or licence plates;
- stock theft involving a bovine or equine animal (i.e. cattle or horses);
- a conspiracy, incitement or attempt to commit any of the above crimes.

But in regard to the Ninth Schedule crimes, section 25(2)(b) of the Act introduces complications. If the peace officer who is going to effect the arrest has reason to believe that the crime concerned is sufficiently serious for the Prosecutor-General to issue a certificate refusing bail, then:

- the arrest may only be effected by a police officer who is an assistant inspector or above (or who is authorised by an assistant inspector), *and*
- if the arrest is being made as a result of an anonymous tip-off, the arresting police officer must immediately record details of the tip-off.

There is also an overlap between the First and Ninth Schedules: the crimes listed in the Ninth Schedule are statutory crimes for which a prison sentence of more than six months can be imposed, so they are all covered by the First Schedule. Hence a peace officer who cannot arrest someone under the Ninth Schedule for stock theft may be able to do so under the First Schedule.

“Reasonable grounds” for suspicion are essential for all arrests under section 25(1)(b); without such grounds an arrest is unlawful. The peace officer who effects an arrest must himself have a reasonable suspicion. It is not enough for him to rely on a report from someone else, unless the report is such as to give him reasonable grounds to suspect. The circumstances, and the contents of the report, must be such that a reasonable man in the position of the peace officer concerned would form the suspicion that a First or Ninth Schedule crime has been committed.<sup>12</sup> Nor is a peace officer entitled to effect an arrest simply on orders from a superior officer.<sup>13</sup> There must be some investigation into the facts before there can be a reasonable suspicion that a crime has been committed.<sup>14</sup> But all that is required is a suspicion, not a certainty. The peace officer does not have to have a *prima facie* case for conviction; he does not have to be certain as to his facts, because otherwise he ceases to be merely suspicious and becomes certain. Suspicion “is a state of conjecture or surmise whereof proof is lacking.”<sup>15</sup>

A peace officer is also authorised to arrest without warrant:<sup>16</sup>

---

<sup>12</sup> *Bull v Attorney-General* 1986 (1) ZLR 117 (S).

<sup>13</sup> *cf Moll v Commissioner of Police & Ors* 1983 (1) ZLR 238 (H).

<sup>14</sup> *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (H); *Minister of Home Affairs v Allan* 1986 (1) ZLR 263 (S) at 269-70.

<sup>15</sup> *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122B-C, cited in *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 96D.

<sup>16</sup> Section 25(2) of the Criminal Procedure and Evidence Act.

- anyone who has in his possession an implement of housebreaking and who cannot account satisfactorily for it;
- anyone who is found in possession of property reasonably suspected of being stolen and who is reasonably suspected of having committed a crime with respect to the property;
- anyone who obstructs a peace officer in the exercise of his lawful duty, or who escapes or tries to escape from lawful custody;
- anyone reasonably suspected of being a deserter from the Defence Forces;
- anyone found loitering in such circumstances as to afford reasonable grounds for believing that he has committed or is about to commit a crime;
- anyone reasonably suspected of being a prohibited immigrant;
- anyone who is liable to extradition from Zimbabwe;
- anyone who offers to sell or deliver to him any property which the peace officer believes on reasonable grounds to have been acquired by that person by means of a crime for which the person can be arrested without a warrant.<sup>17</sup>

### Reasonableness of arrest

Note that in all the above cases a peace officer is *authorised* to effect an arrest; he is not obliged to do so. He has a discretion in the matter, and should only arrest a person if he considers the arrest is necessary after taking into account such factors as the possibility of escape, the prevention of further crime and the obstruction of police enquiries (i.e. the same sort of considerations as apply to the grant or refusal of bail). The power of arrest, which is a discretionary power, must be exercised reasonably;<sup>18</sup> it is not intended always, or even ordinarily, to be exercised.<sup>19</sup> Nevertheless, the courts will not lightly hold that a peace officer exercised his discretion wrongly, and will interfere only if the decision to arrest was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.<sup>20</sup>

Private persons, i.e. people who are not peace officers, may also arrest persons without a warrant, though their power is more limited.

A private person is authorised to arrest:

- anyone who commits or attempts to commit a First Schedule crime in his presence. The private person may also “forthwith pursue” any such person, and anyone else may join in the pursuit.<sup>21</sup>
- anyone upon reasonable suspicion that the other person has committed a First Schedule crime;<sup>22</sup>
- anyone whom the private person reasonably suspects has committed a crime and is escaping from someone else who is reasonably suspected to be entitled to arrest him;<sup>23</sup>

---

<sup>17</sup> Section 31 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>18</sup> *Botha v Zvada & Anor* 1997 (1) ZLR 415 (S) at 418G.

<sup>19</sup> *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S).

<sup>20</sup> *Per* Lord Diplock in *CCSU v Minister for the Public Service* [1984] 3 All ER 935 (HL) at 951a-b, cited in *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 99 D.

<sup>21</sup> Section 27(1) of the Criminal Procedure and Evidence Act.

<sup>22</sup> Section 30 of the Criminal Procedure and Evidence Act. Note that the section does not seem to require that the private person must himself have the reasonable suspicion.

- anyone he sees fighting in a public place in order to stop the fight;<sup>24</sup>
- anyone whom he finds committing a crime on (immovable) property which he (the private person) owns, occupies or controls;<sup>25</sup>

In addition, if the commander or person in charge of a ship, boat or aircraft knows or reasonably suspects that someone is committing, has committed or is about to commit any crime on the ship, boat or aircraft, the commander or person in charge may arrest that person without a warrant or authorise anyone else to do so.<sup>26</sup>

In only one circumstance are peace officers and private persons required to arrest suspects: if they are “authorised” to do so by a verbal order of a judge, magistrate or justice of the peace. If so authorised, they are “empowered and required” to pursue the suspect if he runs away and to arrest him.<sup>27</sup>

### Purpose of arrest without a warrant

The purpose of an arrest without a warrant is to bring the arrested person to trial, or to make further enquiries before deciding whether the case merits prosecution.<sup>28</sup> It may also be to stop the person from committing a crime. It is not to punish him for a crime for which he has not yet been convicted:

“If the object of the arrest, though professedly to bring the accused person before the court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearing in court, the arrest is, no doubt, unlawful.”<sup>29</sup>

### Requirement to supply name and address

A peace officer may call upon:

- anyone whom he has power to arrest;
- anyone reasonably suspected of having committed a crime; and
- anyone who, in his opinion, may be able to give evidence regarding the commission or suspected commission of a crime;

to furnish his full name and address.<sup>30</sup> Failure to do so is a crime, as is giving a false name or address, and renders the person liable to immediate arrest. A peace officer can arrest and detain a person for up to 12 hours while he verifies the person’s name and address, if he has reasonable grounds to suspect that the name or address furnished is false.<sup>31</sup>

---

<sup>23</sup> Section 27(2) of the Criminal Procedure and Evidence Act.

<sup>24</sup> Section 28 of the Criminal Procedure and Evidence Act.

<sup>25</sup> Section 29 of the Criminal Procedure and Evidence Act.

<sup>26</sup> Section 31A of the Criminal Procedure and Evidence Act.

<sup>27</sup> Section 24 of the Criminal Procedure and Evidence Act.

<sup>28</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 121.

<sup>29</sup> *Tsose v Minister of Justice & Ors* 1951 (3) SA 10 (A), cited in *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) at 464.

<sup>30</sup> Section 26(1) of the Criminal Procedure and Evidence Act.

<sup>31</sup> Section 26(2)(b) of the Criminal Procedure and Evidence Act.

## Procedure after arrest without a warrant

### *Holding of suspect by Police: length of period*

A person who has been arrested without a warrant must be informed, at the time of the arrest, of the reasons for the arrest and must be taken to a police station or charge office as soon as possible.<sup>32</sup> He must then be brought before a court as soon as possible and in any event not later than 48 hours after the arrest.<sup>33</sup> His detention may not be extended except by order of a court. If he is not brought to a court within that period, he must be released immediately.<sup>34</sup>

### **Arrest with warrant**

#### Application for warrant of arrest

*Written application:* A warrant of arrest may be issued by a judge, magistrate or justice of the peace (other than a justice of the peace who is a police officer).<sup>35</sup>

A written application may be made by:

- the Prosecutor-General or a local public prosecutor; or
- a police officer of or above the rank of inspector; or
- a police officer in charge of a police station, if he is of or above the rank of assistant inspector.<sup>36</sup>

A written application must:

- set out the crime alleged to have been committed;
- state that, from information available to the applicant, the applicant has reasonable grounds for suspicion against the suspect who is to be arrested; and
- where the application is made to a magistrate or a justice of the peace, allege that the crime was committed within the area of jurisdiction of the magistrate or justice.

Note that under the Act the person issuing the warrant does not have to be told the information on which the applicant relies for his reasonable suspicion, or even the gist of it. The person issuing the warrant, in other words, does not himself have to have a reasonable suspicion that the suspect committed a crime.

*Oral application:* A warrant may also be issued by a judge, magistrate or justice if anyone gives information on oath to him, stating that from information available to him he has reasonable grounds for suspecting that a suspect has committed a crime.<sup>37</sup> Again, the person issuing the warrant does not have to form a reasonable suspicion against the suspect.

In both cases, all the person issuing the warrant has to be satisfied is<sup>38</sup>:

- that the alleged crime is a crime at law; and

---

<sup>32</sup> Section 32 of the Criminal Procedure and Evidence Act.

<sup>33</sup> Section 50(2) of the Constitution and section 32(3) of the Criminal Procedure and Evidence Act.

<sup>34</sup> Section 50(3) of the Constitution.

<sup>35</sup> Section 33(1) of the Criminal Procedure and Evidence Act.

<sup>36</sup> Section 33 of the Criminal Procedure and Evidence Act.

<sup>37</sup> Section 33(1) of the Criminal Procedure and Evidence Act.

<sup>38</sup> *Prinsloo & Anor v Newman* 1975 (1) SA 481 (A).

- that the alleged crime is of such a nature and gravity as to justify the issue of a warrant; and
- that the applicant is empowered to make the application.

### Contents of warrant of arrest

A warrant of arrest states that the person named in the warrant must be apprehended and brought before a judicial officer as soon as possible on a charge of committing the crime named in the warrant.<sup>39</sup>

A warrant remains valid until it is executed or cancelled, or until the suspect is otherwise arrested.<sup>40</sup>

### Execution of warrants of arrest

All peace officers (not just police officers) have a duty to execute a warrant of arrest.<sup>41</sup> A peace officer who executes a warrant does not have to have a reasonable suspicion regarding the suspect whom he arrests. He must simply execute the warrant.

When a peace officer arrests a suspect under a warrant, he must produce the warrant if the suspect so demands, and notify the suspect of its substance (i.e. tell the suspect what it means).<sup>42</sup> He must also tell the arrested suspect why he is arresting him.<sup>43</sup> The arrested suspect must be brought to a police station or charge office as soon as possible, and from there must be brought as soon as possible to a judicial officer.<sup>44</sup> The same 48-hour period applicable for arrests without warrant applies also to arrests made by virtue of a warrant.<sup>45</sup>

A person who arrests another person under a warrant is protected against legal proceedings for wrongful arrest if:

- he arrests the wrong person, so long as he does so in good faith and on reasonable grounds believes he is arresting the person named in the warrant;<sup>46</sup>
- the warrant is defective, so long as he believed, in good faith and without negligence, that the warrant was valid.<sup>47</sup>

### ***Use of force in effecting an arrest***

A person who is authorised to effect an arrest may break open doors and enter any premises where the suspect is known or suspected to be, if he is not allowed access to the premises after audibly demanding admission and stating his purpose.<sup>48</sup>

If a suspect resists an attempt to arrest him and cannot be arrested without the use of force, or if he runs away when it is clear that an attempt is being made to arrest him, then accord-

---

<sup>39</sup> Section 38 of the Criminal Procedure and Evidence Act.

<sup>40</sup> Section 33(3) and (4) of the Criminal Procedure and Evidence Act.

<sup>41</sup> Section 34(1) of the Criminal Procedure and Evidence Act.

<sup>42</sup> Section 34(2) of the Criminal Procedure and Evidence Act.

<sup>43</sup> Section 50(1)(a) of the Constitution – which applies equally to arrests with or without warrant.

<sup>44</sup> Section 34(3) of the Criminal Procedure and Evidence Act.

<sup>45</sup> Section 50(2) of the Constitution, which lays down the 48-hour period, does not distinguish between arrests with or without warrant.

<sup>46</sup> Section 36 of the Criminal Procedure and Evidence Act.

<sup>47</sup> Section 37 of the Criminal Procedure and Evidence Act.

<sup>48</sup> Section 40 of the Criminal Procedure and Evidence Act.

ing to section 42(1) of the Criminal Procedure and Evidence Act<sup>49</sup> the person attempting to arrest him has the right to “use such force as is reasonably justifiable and proportionate<sup>50</sup> in the circumstances” to overcome the resistance or to prevent the escape. The proviso to section 42(1), however, creates confusion. It says, in effect, that the use of force (any force) is permissible only if the following conditions are met:

- a) the crime for which the person is being arrested is one specified in the First Schedule to the Act, i.e. is one for which imprisonment for more than six months is prescribed as a punishment and can be imposed without the option of a fine, and
- b) the person trying to effect the arrest believes on reasonable grounds either:
  - i. that the force is needed to protect himself or herself, or anyone else, from death or grievous bodily harm, or
  - ii. there is a substantial risk that the suspect will cause someone death or grievous bodily harm if the arrest is delayed, or
  - iii. the crime for which the suspect is to be arrested is in progress and involves life-threatening violence or grievous bodily harm.

According to the section, no force, however mild, can be used to effect an arrest if the above conditions are not met. This cannot have been the real intention, because what it means is that if for example a suspect is to be arrested for theft (not a life-threatening crime) and the suspect refuses to submit to the arrest, the arresting officer cannot even grab the suspect by the hand to prevent him running away. Still, that is what the section in its present form says.

The confusion is compounded by subsection (2) of section 42, which says that “for the avoidance of doubt” no use of “lethal force” may be used unless there is strict compliance with the conditions laid down in section 42(1) and set out above. Lethal force is the same as deadly force and means “violent action known to create a substantial risk of causing death or serious bodily harm”.<sup>51</sup> So section 42(2) does not authorise actual killing (because of section 48 of the Constitution it cannot do so) and merely authorises force that *may* kill so long as the conditions set out in section 42(1) are met. But those conditions must be present before any force, not just lethal force, may be employed.

If those conditions are present the arresting officer may use force that is reasonable and proportionate. He or she must prove:

- that he or she was lawfully entitled to arrest the suspect;
- that the arrest was intended to bring the suspect to justice;<sup>52</sup>
- that he or she tried to arrest the suspect;
- that the suspect resisted arrest or tried to run away;
- that the degree of force used was reasonably necessary and proportionate to effect the arrest or prevent the escape.<sup>53</sup>

---

<sup>49</sup> As amended by the Criminal Procedure and Evidence Amendment Act, 2016 (Act No. 2 of 2016).

<sup>50</sup> “Proportionate” has the same meaning as “proportional” and is discussed below.

<sup>51</sup> Black’s Law Dictionary, 4th pocket edition.

<sup>52</sup> *S v Malindisa* 1961 (3) SA 377 (T), where the accused shot and killed someone whom he suspected of having stolen his dagger. He could not be regarded as trying to arrest the person because there was no intention of bringing him to justice.

<sup>53</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 93; Lansdown & Campbell *SA Criminal Law & Procedure* vol 3 p. 296.

Reasonableness in this context requires an objective approach, though the *bona fides* of the person trying to effect the arrest is relevant in determining the question of reasonableness.<sup>54</sup> The force must also be proportionate, and in South Africa the courts have used a proportionality test in assessing reasonableness in the context of arrest: the degree of force used must be proportional to the seriousness of the crime<sup>55</sup> for which the suspect is being arrested, and to all the circumstances in which the force is used.<sup>56</sup> The arrestor must not resort to an indiscriminate use of force; the use of a firearm to effect an arrest should be resorted to with great caution;<sup>57</sup> and a police officer should resort to using a firearm only if there is no other way at all to capture the suspect.<sup>58</sup> Indeed, because the Constitution does not permit anyone's life to be taken away (except the lives of criminals who have been sentenced to death by a court), it may be said that police officers should not resort to using firearms at all. Any force that is used must be directed at the suspected offender who is trying to escape. Where, for example, the suspect is one of the occupants of a vehicle among whom there may be innocent people, the arresting officer may not shoot indiscriminately at the occupants (*Government of RSA v Basdeo* 1996 (1) SA 355 (A)).

If, however, a police officer is attacked by a suspect whom he is trying to arrest, he is entitled to defend himself with whatever means are available if he has no reasonable alternative. He is not obliged to flee from an unlawful assault in such circumstances, because that would amount to a dereliction of duty. Thus if a suspect attacks a police officer who has a firearm in his hands, the suspect has only himself to blame if the firearm is used in self-defence<sup>59</sup> — though, as pointed out above, the police officer is not entitled to kill the suspect even in self-defence.

The law in South Africa regarding the use of force in effecting an arrest was summed up by the South African Constitutional Court in *Ex parte Minister of Safety & Security & Ors, in re S v Walters & Anor* 2002 (4) SA 613 (CC) at para 54 (p 643):

“In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

- a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
- b) Arrest is not the only means of achieving this purpose, nor always the best.
- c) Arrest may never be used to punish a suspect.
- d) Where arrest is called for, force may be used only where it is necessary to carry out the arrest.
- e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.
- f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the ar-

---

<sup>54</sup> *S v Purcell-Gilpin* 1971 (1) RLR 241 (A).

<sup>55</sup> *Matlou v Makhubedu* 1978 (1) SA 946 (A): in other words, the less serious the offence the less the degree of force that may be used.

<sup>56</sup> *Govender v Minister of Safety & Security* 2001 (4) SA 273 (SCA).

<sup>57</sup> *S v Martinus* 1990 (2) SACR 568 (A)

<sup>58</sup> *Matlou v Makhubedu* 1978 (1) SA 946 (A). See also *R v Gege* 1945 SR 134, where Tredgold J said that the power under what is now section 42(2) of the Act should be exercised only when it appears to the arrestor that, in all the circumstances, there is no reasonable alternative and when he has done everything in his power to achieve his purpose by other means.

<sup>59</sup> *Ntsomi v Minister of Law & Order* 1990 (1) SA 512 (C).

rester or others, and the nature and circumstance of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.”.

These points reflect our law in Zimbabwe – or at least what was probably the real intention behind the new section 42 of the Criminal Procedure and Evidence Act.<sup>60</sup>

### ***Effect of unlawful arrest***

If an arrest is unlawful, any subsequent detention of the suspect, and any subsequent remand, is also unlawful, even if the suspect is allowed bail.<sup>61</sup> The unlawfulness of an arrest does not, however, affect the Prosecutor-General’s right to continue prosecuting the arrested person,<sup>62</sup> unless the accused person was abducted or illegally arrested outside the country and brought into Zimbabwe to stand trial,<sup>63</sup> or if the decision to prosecute is based on evidence unlawfully extracted from the accused person by torture or ill-treatment while he was in custody.<sup>64</sup>

### ***Taking of fingerprints, etc.***

A peace officer may take the fingerprints, palm-prints, footprints and photographs of a person who has been arrested, and may examine the arrested person to ascertain if his body has any mark or characteristic. He or she is entitled to use reasonable force to take the fingerprints, palm-prints, etc.<sup>65</sup> An authorised person<sup>66</sup> may take a buccal sample<sup>67</sup> from an arrested person,<sup>68</sup> and at the request of a police officer of or above the rank of superintendent a medical officer may take an “intimate sample”<sup>69</sup> from an arrested person. Furthermore, a government medical officer or a prison medical officer may take a sample of an arrested person’s blood, saliva or tissue, but this can only be done at the request of a police officer of or above the rank of superintendent.<sup>70</sup>

Any fingerprints, palm-prints, etc, taken from an accused person must be destroyed if the accused is acquitted, or if his conviction is set aside on appeal or review, or if the Prosecutor-General declines to prosecute him, or if the charge against him is otherwise withdrawn.<sup>71</sup>

### ***Records to be kept of arrested persons***

As already noted, persons who have been arrested without warrant must be brought without delay to a police station. The police officer in charge of the station must ensure that a rec-

---

<sup>60</sup> Additional points made by the court in regard to the killing of suspects have been omitted from the above quotation, because South African law differs from our law on the subject.

<sup>61</sup> *S v Poli* 1987 (2) ZLR 30 (H) and sec 50(8) of the Constitution.

<sup>62</sup> *Bull v Attorney-General & Anor* 1986 (1) ZLR 117 (S) at 125D.

<sup>63</sup> *S v Beahan* 1991 (2) ZLR 98 (S) at 111B-C. In *Chinanzvavana & Anor v Attorney-General* 2010 (2) ZLR 43 (H) at 57C it was suggested that the same might apply where the accused was abducted locally.

<sup>64</sup> *Mukoko v Attorney-General* 2012 (1) ZLR 321 (S).

<sup>65</sup> *Jesse v Attorney-General & Ors* 1994 (2) ZLR 416 (H) at 423-4.

<sup>66</sup> An authorised person is defined in section 2 of the Criminal Procedure and Evidence Act as a medical officer, health professional or other person trained to take samples.

<sup>67</sup> A saliva sample taken from the mouth.

<sup>68</sup> Section 41(3) of the Criminal Procedure and Evidence Act.

<sup>69</sup> There is no definition of “intimate sample” in the Act. It is not clear whether it covers a blood sample.

<sup>70</sup> Section 41D of the Criminal Procedure and Evidence Act.

<sup>71</sup> Sections 41(5) and 41D(4) of the Criminal Procedure and Evidence Act.

ord is kept of all persons brought to the station or detained there, detailing their identities, when they were brought there or first detained there, the crime for which they were arrested, when they were released (if they are released) and, if they were transferred to some other place, when they were transferred, where they were transferred to and why. These records must be open to inspection by interested persons (presumably family members and lawyers).<sup>72</sup>

### ***Rights of suspect and his practitioner after arrest***

A person who is arrested and detained must be informed, at the time of his arrest,<sup>73</sup> of:

- a) the reason for the arrest,
- b) his or her right to remain silent and of the consequences of remaining silent or of speaking,
- c) his or her right to contact, at the expense of the State, anyone of their choice.<sup>74</sup>

A form of words to guide peace officers in explaining their rights to accused persons is set out in the Tenth Schedule to the Criminal Procedure and Evidence Act.

A person who has been arrested or detained must be permitted, without delay, to contact, at the State's expense, anyone of his or her choice, including his legal practitioner, spouse or relative.<sup>75</sup> If the arrested or detained person cannot contact his first choice of person, then the police or other authorities responsible for his detention must allow him to try anyone else until he finally makes contact with someone.<sup>76</sup> Also, the authority responsible for detaining a person must inform any interested party, promptly on request, of the detained person's whereabouts and the reasons for the detention – unless there are compelling reasons for not doing so.<sup>77</sup>

The right to obtain and consult, in private, with a legal practitioner of one's choice does not mean that the accused person is entitled to immediate access to his legal practitioner; it means he must be allowed to consult the practitioner as soon as is reasonably practicable in the circumstances.<sup>78</sup> Nor is his access completely unfettered: after all, he is in detention. It is doubtful if a suspect is entitled to have his legal practitioner present when he is fingerprinted, but there are good grounds for holding that he has a right to consult his practitioner before he is questioned by the Police or makes a statement to them. A statement made by an accused who has been arrested will not be admissible at his trial, even if it has been confirmed by a magistrate, if the accused was denied access to his legal practitioner before and during the confirmation proceedings. As Dumbutshena JP (as he then was) said in *S v Slater & Ors* 1983 (2) ZLR 144 (H) at 166, "If an accused person wants a legal practitioner before, or during, interrogation, the police investigators must stop their investigations [*sic*: he meant "interrogation"] and only resume after the accused has had consultations with his legal practitioner." And the statement will also be inadmissible if the accused person's

---

<sup>72</sup> Section 41C of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>73</sup> Section 50(1)(a) of the Constitution says "at the time of arrest"; section 41A of the Criminal Procedure and Evidence Act says "promptly".

<sup>74</sup> Section 50 of the Constitution and section 41A of the Criminal Procedure and Evidence Act.

<sup>75</sup> Section 385A of the Criminal Procedure and Evidence Act, echoing section 41A of the Act and section 50 of the Constitution.

<sup>76</sup> *Ibid.*

<sup>77</sup> Section 385A(3) of the Criminal Procedure and Evidence Act.

<sup>78</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 5-21.

lawyer was denied access to the accused, even though the accused had no knowledge of the lawyer's efforts on his behalf.<sup>79</sup> For that reason, the practice of refusing to tell an accused person's legal representative where the accused is being detained — apart from being an unconstitutional violation of the accused's right to legal representation and a contravention of section 385(3) of the Criminal Procedure and Evidence Act — may also result in any statement being rendered inadmissible.

### **Remand**

An arrested person, as we have seen, must be brought before a court within 48 hours. The court is usually not in a position to try him immediately, however, so it may postpone his trial. This is called a "remand".

The distinction between remand and bail must be kept in mind. Remand is simply a postponement of trial, and during the remand (i.e. while the accused person is awaiting trial) he may be kept in custody or allowed his freedom — that is to say, released on bail. He is on remand whether he is in custody or out on bail. In practice the distinction is blurred because when an accused person is remanded the court will simultaneously or immediately afterwards consider the question of bail, i.e. whether to order the accused to remain in custody or to allow him bail. But the issues are separate and distinct: the court has first to decide whether or not to remand the accused, and then — only if it decides he should be remanded — decide whether he should be allowed bail.

A remand may properly be sought for several reasons, of which the usual ones are:

- the Police need time to complete their investigations;
- the need to find a convenient time for the trial to take place;
- the accused person needs to arrange his defence;
- to await the Prosecutor-General's authority to prosecute the accused, where this is necessary;
- difficulties in locating or subpoenaing witnesses.

The reasons must be explained to the court by the prosecutor who seeks the remand.

### **When court may/may not remand an accused**

On a remand, the prosecutor normally informs the court of the facts alleged against the accused person, using a "request for remand" form prepared by the Police. The State (i.e. the prosecutor) must show that there are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed or was about to commit a crime.<sup>80</sup> The criterion is one of reasonable suspicion, "a practical, non-technical concept" which balances the State's duty to control crime with the individual's right to liberty.<sup>81</sup> The test of reasonable suspicion for the purpose of remand is the same as the test used for arrest without warrant.<sup>82</sup> The question whether or not there is a reasonable suspicion can be determined without a full adversary hearing, and normally the court acts on the word of the prosecutor. But, as with an arrest, the prosecutor must provide enough information to give the remand court a reasonable suspicion that

---

<sup>79</sup> *S v Slatter & Ors* 1983 (2) ZLR 144 (H) at 154. See also *S v Woods & Ors* 1993 (2) ZLR 258 (S) at 266.

<sup>80</sup> *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122A-B. It is doubtful, however, that a person could properly be arrested on suspicion that he was about to commit a crime.

<sup>81</sup> *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122.

<sup>82</sup> *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S).

the accused person had committed or was about to commit the crime with which he is charged: the court itself must have that reasonable suspicion before it can remand the accused. Hence the court must be careful to elicit from the prosecutor the grounds on which a reasonable suspicion can be founded, and prosecutors must where possible be open and forthright with the court in disclosing those grounds.<sup>83</sup> If one or more of the elements of the crime with which the accused is charged are not alleged either in the request for remand form or orally by the prosecutor, then it cannot be said that a reasonable suspicion has been established justifying placing the accused on remand.<sup>84</sup>

An accused person is entitled to challenge his remand. If the State cannot show sufficient facts to justify a reasonable suspicion, or cannot show that the accused's alleged conduct, if proved, would constitute a crime, then the court should refuse to remand the accused.

It is not proper for an accused person to be kept on remand on a minor crime when the real purpose of keeping him in custody is to investigate a much more serious crime.<sup>85</sup>

The fact that an accused person was unlawfully arrested should not, on principle, prevent his being remanded if there are proper grounds for the remand, i.e. if there are facts and circumstances sufficient to give rise to a reasonable suspicion that he has committed or was about to commit a crime. In such a case, however, the remanding magistrate should be alert to the possibility that the prosecution is based on evidence that was elicited from the accused person through torture or similar unlawful treatment.<sup>86</sup>

## Period of remand

### *High Court*

There is no limit to the period that the High Court can remand an accused person.

### *Magistrates court*

**General rule:** Where an accused person has been brought before a magistrate, his case cannot be remanded (postponed) for longer than 14 days at any one time unless he consents to a longer period.<sup>87</sup> In practice 14-day remands are the norm, even though in petty cases a shorter period may be justified.

### **Exceptions to the general rule:**

Section 32(3a) & (3b) of the Criminal Procedure and Evidence Act specify circumstances in which accused persons must be remanded for 21 days without bail, where they have been charged with certain crimes:

- If the accused has been arrested for any of the following crimes:
  - subverting constitutional government (section 22 of the Criminal Law Code); or
  - crimes relating to insurgency, banditry, sabotage or terrorism (sections 23 to 29 of the Criminal Law Code);

---

<sup>83</sup> *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S)

<sup>84</sup> *S v Chiyangwa* 2005 (1) ZLR 163 (H).

<sup>85</sup> *R v Sambo* 1964 RLR 565 (A) at 570A.

<sup>86</sup> Cf *Mukoko v Attorney-General* 2012 (1) ZLR 321 (S).

<sup>87</sup> Section 165 of the Criminal Procedure and Evidence Act.

and the judicial officer before whom the accused is brought is satisfied that there is a reasonable suspicion that he committed the crime concerned, the judicial officer must order his further detention for 21 days<sup>88</sup> [plus a further 48 hours, within which an application is made to a judge or magistrate for a warrant authorising the accused's further detention<sup>89</sup>].

- Similarly, if the accused has been arrested for a crime set out in the Ninth Schedule to the Criminal Procedure and Evidence Act (i.e. a crime involving corruption, organised crime or serious dishonesty), the judicial officer before whom the accused is brought must order his further detention for 21 days<sup>90</sup>, or a shorter period specified by the Prosecutor-General, if:
  - the prosecutor produces a certificate stating that the Prosecutor-General considers the crime involves significant prejudice or potential prejudice to the national economy and that the accused's continued detention is necessary; and
  - the judicial officer is satisfied that the accused's arrest is lawful; and
  - the judicial officer is satisfied that there is a reasonable suspicion that the accused committed the crime concerned.<sup>91</sup>

These provisions are unconstitutional, because they deny the remanding court the power to grant bail to the accused person [we shall deal with the right to bail in a subsequent lecture].

### Right to trial within a reasonable time

Everyone has a right to a trial within a reasonable time<sup>92</sup>, so the total length of successive remands must not infringe the accused's right in that respect. Some delay is inevitable in most cases but the delays must be reasonable. If the delay has become unreasonable, the magistrate or judge must refuse any further remand. What is a reasonable time? That depends on the circumstances of the case, and it is not possible to lay down a specific period that would be unreasonable in all cases. Much depends on the reason for the delay, as well as the extent of the delay. The period begins from the moment the suspect is "charged", i.e. officially informed of an allegation that he has committed a crime; a mere investigation is not enough.<sup>93</sup> The running of the period is not interrupted by the withdrawal of charges before plea, if the accused is subsequently charged with the same crimes. To constitute a violation of the right to trial within a reasonable time, the delay must be "extraordinary"<sup>94</sup>. In one case<sup>95</sup>, where the accused person was facing serious fraud charges, a delay of four years

---

<sup>88</sup> Sections 32(3a) and 34(4)(a) of the Criminal Procedure and Evidence Act. The effect, indeed the validity, of those provisions is doubtful. They refer to a crime "referred to in paragraph 10 of the Third Schedule" to the Act, but the Third Schedule has since been amended and there is no longer a paragraph 10. Furthermore, the crimes concerned, which were set out in the Public Order and Security Act, are now contained in Chapter III of the Criminal Law Code.

<sup>89</sup> Section 34(6) of the Criminal Procedure and Evidence Act.

<sup>90</sup> Which, under section 34(6) of the Criminal Procedure and Evidence Act, may be extended for 48 hours to enable an application to be made to a judge or magistrate for a warrant authorizing the accused's further detention.

<sup>91</sup> Sections 32(3b) and 34(4)(b) of the Criminal Procedure and Evidence Act.

<sup>92</sup> Section 69(1) of the Constitution.

<sup>93</sup> *Smyth v Ushekowunze & Anor* 1997 (2) ZLR 544 (S); see Linington *Constitutional Law of Zimbabwe* p. 400.

<sup>94</sup> *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S).

<sup>95</sup> *In re Mlambo* 1991 (2) ZLR 339 (S).

and seven months was enough to trigger an inquiry into whether the accused's right had been violated; in another<sup>96</sup> a delay of seven years was enough. In *S v Tau* 1997 (1) ZLR 93 (H), Gillespie J said:

“[The Supreme Court's decision in *S v Midzi & Ors* 1994 (2) ZLR 218 (S)] was no doubt an appropriate conclusion for a complicated case of fraud and corruption where the accused were on bail. In a different situation, however, twelve months delay might well be unreasonable and oppressive. I would venture to suggest that the scrupulous magistrate would in all cases be questioning the State very closely indeed on any application for further remand made after delays approaching a year.”

Under section 167A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] courts are now obliged to investigate delays in cases pending before them where the delay appears unreasonable and could cause substantial prejudice to the prosecution, to the accused or his or her lawyer, to a witness or any other person concerned in the proceedings, or to the public interest. In deciding whether a delay is unreasonable, a court considers amongst other things:

- the extent of the delay and the reasons for it;
- whether anyone can be blamed for the delay;
- whether the accused has raised such objections to the delay as he might reasonably have been expected to have raised;<sup>97</sup>
- the seriousness and complexity of the charges;
- prejudice the delay may have caused to the State, the accused or anyone else concerned in the proceedings;
- the adverse effect that stopping the prosecution would have on the public interest or the interests of victims.

If the delay is found to be unreasonable, the court can refuse or impose conditions on further postponements or remands, or permanently stay the prosecution, and in addition can refer the matter to the appropriate authorities for investigation and possible disciplinary action. The Prosecutor-General is entitled to appeal against an order permanently staying a prosecution.<sup>98</sup>

Before the courts will enquire into a violation of the accused's right to a speedy trial, it must be shown that the accused suffered prejudice from the delay; this is assessed in the light of the interests which the right to a speedy trial is intended to protect, namely:

- to prevent oppressive pre-trial imprisonment;
- to minimise the anxiety and concern of the accused while he awaits trial;
- to limit the possibility that his defence will be impaired (e.g. witnesses may no longer be available for the trial).

---

<sup>96</sup> *In re Masendeke* 1992 (2) ZLR 5 (S).

<sup>97</sup> This suggests that if the accused is not legally represented and is ignorant of the law, he should not be penalised for not objecting to a delay. This point was made in *S v Tau* 1997 (1) ZLR 93 (H) and *S v Mavharamu* 1998 (2) ZLR 341 (H). See also *Woods & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1993 (2) ZLR 443 (S) at 445H, where Gubbay CJ said: “[P]assivity in the assertion of a constitutional right necessarily implies an awareness that there has been a breach and that a meaningful remedy is available.”

<sup>98</sup> Section 167A(4) of the Criminal Procedure and Evidence Act.

The factors which a court must take into account in deciding whether there has been an unreasonable delay in bringing an accused person to trial are set out in section 167A(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

## 2. Summons

A summons is a formal notice to the accused person setting out the charges against him and requiring him to appear at a magistrates court at a stated time to stand trial on the charges. Note that summonses are not issued to bring accused persons to trial in the High Court.

Issuing a summons to secure the attendance of an accused person at his trial, rather than arresting him, should be preferred in those cases in which there is no reason to suppose that he will fail to appear in court, or interfere with the State evidence or commit further crimes. There is no rule of law, however, that requires the issue of a summons where it would be appropriate, or that renders an arrest unlawful if a summons would be equally effective<sup>99</sup> — unless, of course, the decision to arrest an accused is one that no reasonable person would take.<sup>100</sup>

### **Issue of summons**

A summons is prepared by a public prosecutor and lodged with the clerk of the magistrates court.<sup>101</sup> The clerk then issues the summons and delivers it to the messenger of court.<sup>102</sup>

### **Contents of summons<sup>103</sup>**

A summons must:

- identify the accused person by his name, place of abode and occupation;
- set out, shortly and clearly, the nature of the crime and the time and place at which it was committed; and
- require the accused to appear at a stated time and place to answer the charge (i.e. to stand trial on the charge).

### **Service of summons**

A summons may be served on the accused:

- by giving it to him personally;
- if he cannot be found<sup>104</sup>, by leaving it for him at his place of business or at his usual or last-known place of abode.<sup>105</sup>

A summons is served on the accused by a “prescribed officer”<sup>106</sup>. There is no specific prescription of officers under the Criminal Procedure and Evidence Act, but messengers of

---

<sup>99</sup> *Tsose v Minister of Justice* 1951 (3) SA 10 (A) at 17. That may not, however, be the law any longer in South Africa: see *Coetzee v National Commissioner of Police & Ors* 2011 (2) SA 227 (GNP) at 243.

<sup>100</sup> *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S).

<sup>101</sup> Section 139 of the Criminal Procedure and Evidence Act.

<sup>102</sup> Section 140(1) of the Criminal Procedure and Evidence Act.

<sup>103</sup> Section 139 of the Criminal Procedure and Evidence Act.

<sup>104</sup> Whether or not he cannot be found depends on the circumstances of every particular case: *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A).

<sup>105</sup> Section 140(2) of the Criminal Procedure and Evidence Act.

<sup>106</sup> Section 141(2) of the Criminal Procedure and Evidence Act.

magistrates courts would presumably be entitled to serve summonses<sup>107</sup> and police officers are qualified to serve all documents under the Act<sup>108</sup> (Most summonses are in fact served by police officers). In addition to service by messengers of court and police officers, the Magistrates Court (Criminal) Rules, 1966 (RGN 871 of 1966), permit summonses for crimes under certain statutes to be served by officials appointed under those statutes.<sup>109</sup>

If more than one person is being charged jointly, a copy of the summons must be served on each of them.

A summons must be served on the accused at least two working days before the date of his trial.<sup>110</sup> Except in the simplest of cases this may be too short a time for him to prepare his defence, as required by section 70(1)(c) of the Constitution.

### ***Proof of service of summons if accused fails to appear in court***

If the accused does not appear in court on the date and at the time specified in the summons, proof that it was served on him may be given by:

- evidence on oath by the person who served it;
- an affidavit sworn by that person; or
- a return of service written on the summons by that person.<sup>111</sup>

The last of these methods is the usual one that is used.

Where the accused has not appeared, on proof that the summons was served, the magistrate may, at the prosecutor's request, issue a warrant for the accused's arrest and impose a default fine.<sup>112</sup> A default fine is one that may be remitted by the court if the accused person shows cause why it should be remitted (e.g. that he did not see the summons).

## **3. Written Notice to Appear**

In the case of petty crimes, particularly road traffic violations, the accused may be handed a "ticket", a notice to appear in court, by a peace officer.<sup>113</sup> This is applicable where the peace officer believes on reasonable grounds that the crime will attract a fine of not more than level three.<sup>114</sup> The notice must:

- give reasonable particulars of the crime, though it is not necessary to specify the provisions of the enactment concerned;
- set out the accused's full names and address;

---

<sup>107</sup> Because, having issued a summons, the clerk of court delivers it to the messenger for service under section 140(1) of the Criminal Procedure and Evidence Act.

<sup>108</sup> Section 382(4) of the Criminal Procedure and Evidence Act.

<sup>109</sup> Order IIA of the rules, as read with the Second Schedule to the rules. For example, a summons for a crime under the Plant Pests and Diseases Act [*Chapter 20:01*] can be served by an inspector appointed under that Act.

<sup>110</sup> Section 382(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>111</sup> Section 140(3) of the Criminal Procedure and Evidence Act.

<sup>112</sup> Section 140(4) of the Criminal Procedure and Evidence Act. The court does not have to be satisfied that the accused was blameworthy in failing to appear; that becomes relevant at a later stage when he is brought before the court after being arrested: *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A).

<sup>113</sup> Section 141 of the Criminal Procedure and Evidence Act.

<sup>114</sup> Currently (March 2019) \$60.

- call upon the accused to appear in court at a specified date, time and place, to answer a charge of committing the crime;
- state that instead of appearing in court, the accused may pay a deposit fine on or before a specified date; and
- contain a written certificate by the peace officer that he has handed the notice to the accused and explained it to him.

If the accused fails to pay the fine by the specified date, the notice has the effect of a summons.<sup>115</sup>

#### **4. Warning to Appear**

The court may warn an accused person to appear in court to be charged with a crime.<sup>116</sup> In practice this seldom if ever happens. The procedure is potentially useful, for example in ensuring the attendance of juveniles at their trial (instead of releasing a juvenile accused on bail, the court could simply warn him to appear for trial at a particular date and time, and release him into the custody of his parents). It suffers from the disadvantage, however, that there seems to be no penalty for failure to comply with a warning.

#### **5. Extradition**

This is a method of bringing people from one country to stand trial in another country. It is a procedure whereby, for example, a person who has committed a crime in Zimbabwe and has fled to South Africa can be returned to Zimbabwe for trial.

#### **6. Merits of the different methods of securing attendance of accused**

Each of the four methods of securing an accused person's attendance which have been dealt with above has advantages and drawbacks (some of which have already been mentioned):

##### ***Arrest and Remand***

This is by far the most drastic method in that it deprives the suspect of his liberty, at least for a time. On the other hand it may be the most appropriate method to employ, for example where the suspect is arrested while committing a crime. It has the following advantages:

- It may prevent the suspect from continuing to commit a crime or from committing further crimes.
- If the suspect is kept in custody, it is the most certain method of preventing him from absconding or interfering with the evidence – e.g. by intimidating witnesses. While the suspect is in custody his ability to abscond or interfere with evidence is severely reduced. Even if the suspect is granted bail, the court will be able to impose conditions on the grant which will ensure so far as possible that he does not abscond or interfere with witnesses.
- Again if the suspect is in custody, it removes him from society. This may be justifiable where the suspicion against him is strong and well-founded, and the crime which he is suspected of having committed is a serious one which he is likely to repeat.

---

<sup>115</sup> Section 141(5) of the Criminal Procedure and Evidence Act.

<sup>116</sup> Section 142(1) of the Criminal Procedure and Evidence Act.

- In a few cases it may protect the suspect, for example a suspected rapist who is liable to retribution from the complainant's family.

Set against the above advantages, however, are the following drawbacks:

- It can lead to serious abuses:
  - The police may be tempted to use the power of arrest and detention as a means of intimidating a suspect or punishing him or getting him to make a statement or to admit committing a crime.
  - There is an implicit threat of violence in arrest and post-arrest detention, in that the suspect has reason to fear that if he does not do what the arresting police officer wants, he will be forced to comply. All too often, the police succumb to the temptation to use violence against arrested suspects, usually to force them to make incriminating statements.
- The power to use reasonable force in effecting an arrest can cause serious damage and loss to innocent people. If a suspect is injured when resisting or fleeing from an arrest, he will not be entitled to compensation if the arrest was a lawful one (e.g. if the peace officer had reasonable grounds to suspect that he had committed a First Schedule crime) and the degree of force was reasonably justifiable in the circumstances. And this will be so even if it turns out that the suspect was in fact innocent of the crime. Similarly, if a householder's doors and windows are lawfully broken down by the police in an attempt to arrest a person in the householder's premises, the householder will not be entitled to compensation.
- Peace officers often have to make a decision to arrest a suspect, or not to arrest him, very quickly; they cannot spend a long time debating whether or not the suspect is likely to abscond if he is not arrested. Because the decision has to be made quickly, peace officers are likely to err on the side of caution and arrest suspects knowing that when they are brought before a remand court the court will be able to decide whether they should be released or kept in custody.
- An arrest almost invariably humiliates the suspect, and the humiliation can be lasting. People tend to believe, consciously or unconsciously, that a person who has been arrested is a criminal or at least a person of doubtful character.
- An arrest is expensive to the State, if the suspect is detained after being arrested.

### **Summons**

Bringing an accused person to court through a summons has the great advantage, from a human-rights perspective, of not infringing the person's right to liberty. It is also relatively cheap because there is no question of keeping the person in detention. On the other hand, it does have certain disadvantages:

- If the summons is not served personally (i.e. handed to the accused person concerned) the accused may not see it and will not realise that he has to attend court. If he does not appear in court, the magistrate will be entitled to issue a warrant for his arrest without enquiring at that stage whether or not the accused's failure to appear was blameworthy.<sup>117</sup>
- Section 382(1) of the Criminal Procedure and Evidence Act states that summonses must be served at least two working days before the trial date. This may not give the accused

---

<sup>117</sup> *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A).

adequate time to prepare his defence, though he can always ask the trial court for an adjournment.

- Summonses cannot be issued to compel attendance of accused persons in the High Court; the only way to compel their attendance in that court is through committal for trial under Part VII of the Criminal Procedure and Evidence Act.

### ***Written notice to appear***

This has obvious advantages:

- The problem of service, which arises in relation to summonses, does not apply because the written notice is usually given directly to the accused person by the peace officer who issues it. For example, traffic tickets are normally handed directly to the offending motorists.
- Apart from notifying the accused person that he will have to attend court, a written notice gives him the option of avoiding a court appearance by paying a deposit fine (not exceeding level three<sup>118</sup>). Because most people prefer to pay the fine, the courts do not have to conduct numerous trials into petty crimes.

On the other hand, written notices have certain disadvantages:

- In present circumstances in Zimbabwe, the power to issue such notices, particularly traffic tickets, is likely to tempt peace officers to engage in corrupt practices (e.g. offering to refrain from issuing a ticket if the offender pays a bribe).
- The current Standard Scale of Fines fixes the monetary amount of level three at US \$30. This limits the scope of written notices to petty crimes.
- It has been said that written notices deprive offenders of a fair trial, because in many cases they will prefer to avoid the trouble and expense of a trial by paying the deposit fine even if they believe they are not guilty. This is not a convincing objection, because the choice of paying or going to court rests with the offender.

### ***Warning to appear***

As pointed out earlier, this has the disadvantage that there is no way of compelling attendance by a person who has been warned to appear in court. In other words, there is no sanction that can be imposed on a person who fails to appear after having been warned to do so.

---

<sup>118</sup> Section 141(1) of the Criminal Procedure and Evidence Act. Level 3 is currently \$60.

## 5. BAIL PENDING TRIAL

### What is Bail?

Bail is a way of allowing a person who has been remanded for trial at a later date to remain at liberty until his trial. To grant bail means to allow a person to enter into a contract or undertaking (called “a recognisance”) whereby he remains at liberty in consideration for his paying or guaranteeing to pay a sum of money if he fails to appear in court at the date, time and place appointed for his trial or further remand. Once bail is granted, the accused person should not be deprived of his liberty until his bail bond is terminated, unless he breaches any conditions under which bail was granted, and the State has an implied obligation to allow him to remain at liberty so long as he abides by those conditions.<sup>1</sup>

The need for a mechanism such as bail must be understood in the light of the following principles:<sup>2</sup>

1. Arrested persons have a right to be released, unconditionally or on reasonable conditions, unless there are compelling reasons justifying their continued detention.<sup>3</sup>
2. An accused person is presumed to be innocent until he has been convicted by a court of law. He should not, therefore, be deprived of his liberty until he has been convicted. On the other hand, the State has an interest in ensuring that accused persons appear in court for their trial, and in some cases this can only be ensured by keeping them in custody pending trial. A balance must be struck between these two interests.
3. It is not in the interests of justice for bail to be granted to a person who will not stand his trial or will abuse his liberty by, e.g. intimidating the witnesses against him. But nor is it in the interests of justice to refuse bail to a person who will stand his trial and will not abuse his liberty: he will probably lose his employment and the respect he enjoys in the community, and will find it more difficult to make arrangements for his defence at his trial.
4. In deciding whether or not to grant bail, a court must consider the constitutional rights of the accused person and his or her dependants. Where the accused is the primary care-giver of a child, the best interests of the child must be considered together with all the other circumstances.<sup>4</sup>

Bail is non-penal in character, and neither the amount of bail nor the refusal of bail may be influenced by a desire to punish the accused or to deter other offenders.<sup>5</sup> Nor should the grant or refusal of bail be used as an inducement to get the accused to make a statement to the police.<sup>6</sup>

Although the grant of bail in any particular case is pre-eminently a matter for the judicial officer, he or she usually acts on information given by the prosecutor, so the prosecutor has

---

<sup>1</sup> Lansdown & Campbell *S.A. Criminal Law & Procedure* vol 5 p. 311.

<sup>2</sup> See Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 165.

<sup>3</sup> Section 50(1)(d) of the Constitution. Note that under our constitution they have a greater right to be released than they do in South Africa, where sec 35(1)(f) of the S.A. Constitution allows them to be released only “if the interests of justice permit”.

<sup>4</sup> See section 81 of the Constitution.

<sup>5</sup> *S v Visser* 1975 (2) SA 342 (C).

<sup>6</sup> *S v Joone* 1973 (1) SA 841 (C) at 846H.

a duty to place before the court any information he or she has relevant to the grant or refusal of bail.<sup>7</sup>

## Who May Grant Bail

A judge may grant bail in respect of any crime. A magistrate within whose area of jurisdiction the accused is being kept in custody may grant him bail in respect of all crimes except a serious crime specified in the Third Schedule to the Criminal Procedure and Evidence Act,<sup>8</sup> of which the most important are:

- treason;
- murder or attempted murder;
- rape or aggravated indecent assault;
- robbery;
- indecent assault of a child;
- kidnapping or unlawful detention involving the infliction of serious bodily harm;
- crimes involving insurgency, banditry, sabotage or terrorism;
- any crime where the accused is to be indicted to the High Court for trial.

If, however, the Prosecutor-General personally consents to the magistrate granting bail for any of the above crimes, then the magistrate has power to do so.<sup>9</sup>

When an accused person is indicted for trial in the High Court, the bail will stand but a judge of the High Court may revoke it or alter any condition under which it was granted.<sup>10</sup>

Bail may also be granted by a police officer; that is dealt with in a later section.

## Application for Bail

Before an accused person can be granted bail, he must apply for it, and the application cannot be made until he or she has appeared in court on a charge — that is, when he is formally placed on remand.<sup>11</sup>

An accused person who appears before a judge or magistrate before trial (for example, when he appears on remand) may apply verbally<sup>12</sup> to be admitted to bail immediately; alternatively he may make a written application in the form prescribed in rules of court.<sup>13</sup> Every such application must be dealt with promptly.<sup>14</sup>

---

<sup>7</sup> *Carmichele v Minister of Safety & Security & Anor* 2001 (4) SA 938 (CC) at pp 967E-968A.

<sup>8</sup> Section 116(a) and (b) of the Criminal Procedure and Evidence Act.

<sup>9</sup> Section 116(b), proviso, of the Criminal Procedure and Evidence Act. See also proviso (iii) to section 116.

<sup>10</sup> Section 66(2a) of the Criminal Procedure and Evidence Act.

<sup>11</sup> Section 117(1) of the Criminal Procedure and Evidence Act. See *S v Mukoko* 2009 (1) ZLR 93 (H).

<sup>12</sup> That is the word used in the Act; “orally” would be more accurate.

<sup>13</sup> Section 117A of the Criminal Procedure and Evidence Act. The form to be used in the High Court is prescribed in the High Court of Zimbabwe (Bail) Rules, 1991 (SI 109 of 1991). There is no form prescribed for use in the magistrates court (applications for bail in the magistrates court are normally made orally) but if a written application is made to a magistrate it would be wise to follow the format of the High Court application.

<sup>14</sup> Section 117A(3) of the Criminal Procedure and Evidence Act.

The Prosecutor-General or the local public prosecutor must be given reasonable notice of oral bail applications<sup>15</sup> — though in practice applications are made by accused persons on their first remand without giving such notice.

When a written bail application is made to the High Court, the application is filed with the Registrar of the High Court and a copy must be served on the Prosecutor-General either by the Registrar or by the accused's legal practitioner. The Registrar must set the matter down for hearing within 48 hours after it was filed. The Prosecutor-General must file a written response to the application within three hours before the hearing.

In a bail application, the judge or magistrate can receive evidence on oath or by affidavit, and hearsay evidence is admissible.<sup>16</sup> In practice, formal evidence is not given in most applications; the accused asks for bail and is questioned by the court to ascertain his circumstances and what amount of bail he can afford. The prosecutor indicates his attitude to the grant or refusal of bail, and the judge or magistrate decides the question on the basis of what he has been told by the accused and the prosecutor. Bail proceedings, in fact, follow the inquisitorial rather than the adversarial model of criminal procedure. Both sides can be required to adduce evidence.<sup>17</sup> If the accused gives evidence, however, the court must inform him that his evidence will be admissible and may be used against him at his trial.<sup>18</sup>

An accused person "is compelled to inform the court" whether he has any previous convictions and whether he is facing other charges and, if he is, whether he has been granted bail on those charges.<sup>19</sup> It is not clear if this means that he must volunteer the information or need disclose it only if asked. If he wilfully fails or refuses to give this information, or gives false information on these matters, he commits a crime. This requirement is almost certainly unconstitutional in that it violates the accused's right to silence.

In bail proceedings an accused person is not entitled to have access to information contained in the police docket of his case, unless the Prosecutor-General consents.<sup>20</sup> This statutory provision runs counter to the judgment in *S v Sithole* 1996 (2) ZLR 575 (H)<sup>21</sup>, in which Devittie J said that in High Court proceedings an accused ought ordinarily to be entitled, if he so requests, to copies of statements of witnesses whom the State proposes to call. (In *Sithole's* case however the court was concerned with the accused person's rights for the purposes of a trial, not bail proceedings before trial).

Bail applications should be recorded, and the record forms part of the record of the trial — though any information the accused may have given regarding his previous convictions is excluded<sup>22</sup> (*query*: how?).

If an application for bail is refused by a judge or magistrate, a further application cannot be made unless it is based on facts that were not placed before the judge or magistrate who first determined the application and which arose or were discovered after he made the decision.<sup>23</sup> If no new facts arise, the only recourse the accused has is to appeal. It should be

---

<sup>15</sup> Section 116, proviso (i), of the Criminal Procedure and Evidence Act.

<sup>16</sup> Section 117A(4) of the Criminal Procedure and Evidence Act.

<sup>17</sup> Section 117A(4)(c) & (d) of the Criminal Procedure and Evidence Act.

<sup>18</sup> Section 117A(7), proviso, of the Criminal Procedure and Evidence Act.

<sup>19</sup> Section 117A(5) of the Criminal Procedure and Evidence Act.

<sup>20</sup> Section 117A(10) of the Criminal Procedure and Evidence Act.

<sup>21</sup> Approved by Gowora J in *S v Chibaya & Ors* 2007 (1) ZLR 71 (H) (HH-4-2007).

<sup>22</sup> Section 117A(7) of the Criminal Procedure and Evidence Act.

<sup>23</sup> Section 116, proviso (ii), of the Criminal Procedure and Evidence Act.

noted, however, that the passage of time can itself constitute a “new fact”: in other words, the fact that a long time has elapsed since an application for bail was made and refused can be placed before the court as a justification for a fresh application.<sup>24</sup>

## **Principles Governing the Grant of Bail**

The refusal or granting of bail is a vitally important part of the criminal process. As Hungwe J said in *S v Chiyangwa* 2005 (1) ZLR 163 (H) at 168G-169A:

“Initial remand is an important step in a citizen’s loss of liberty. After arrest without warrant, it is the first time that his case is presented to a neutral body for arbitration of the issue whether or not, on the basis of mere suspicion, the citizen must lose his freedom. If he loses his freedom at that stage, before his guilt is proved, he may face total ruin. He may lose his job, or other means of his livelihood. He could lose his home too if he is a lodger or a mortgagee as he falls into arrears. This could drive his family into destitution and he is forced to rely on State support for livelihood whilst in custody. The consequences are just too ghastly to contemplate for both the rich and the poor. Magistrates are therefore to take the greatest care when approaching the question whether to deny or grant bail.”

The following principles govern the grant or refusal of bail:

### ***Right to bail***

Section 50(1)(d) of the Constitution states that a person who has been arrested:

“must be released unconditionally, or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention.”

According to section 117(1) of the Criminal Procedure and Evidence Act, every accused person has a right to bail, subject to the interests of justice:

“[A] person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.”

The constitutional provision protects liberty more stringently: an accused person must be released unless there are “compelling reasons” for keeping him in detention; the Criminal Procedure and Evidence Act on the other hand says that he may be detained if it is “in the interests of justice” to do so. Section 115C of the Act seeks to align the Act with the Constitution by saying, in effect, that the grounds listed in section 117 as justifying continued detention in the interests of justice must be regarded as “compelling reasons”. That is fatuous: it is not for Parliament to dictate to the courts what factors they must regard as compelling in order to justify depriving a person of his or her liberty.

### ***Compelling reasons justifying detention***

What are “compelling reasons” justifying the detention of a suspect? It is impossible to define them comprehensively because what is compelling will vary according to the personal circumstances of each suspect and the facts of his or her case. There are three reasons which normally justify continued detention:

- that the suspect is likely to abscond
- that the suspect is likely to interfere with the evidence, e.g. by intimidating witnesses
- that the suspect is likely to commit further crimes if released.

---

<sup>24</sup> *S v Murambiwa* S-62-92; *S v Aitken* (2) 1992 (2) ZLR 463 (S) at 464.

Whether those reasons, individually or in combination, will be compelling depends on the facts and circumstances of each case, as already pointed out. The more likely the suspect is to do any of these things, the more compelling the reason for keeping him in custody.

### **Section 117 of the Criminal Procedure and Evidence Act**

Section 117 of the Act seems to be based loosely on the equivalent provision of the South African Criminal Procedure Act, 1977<sup>25</sup>, which in turn is based on section 35(1)(f) of that country's constitution. Section 35(1)(f) states that everyone who is arrested has the right to be released from detention "if the interests of justice permit". Our Constitution is different, as already noted. Arrested persons in Zimbabwe have a greater constitutional right to bail than is granted them in South Africa; so section 117 does not go far enough in guaranteeing to arrested persons their right to bail. To that extent, therefore, it is unconstitutional. Merely saying, as section 115C does, that the reasons listed in section 117 amount to compelling reasons does not render section 117 constitutional.

Be that as it may, section 117 of the Criminal Procedure and Evidence Act elaborates on the three reasons for continued detention listed above, and sets out in detail the considerations to be taken into account by a judge or magistrate when deciding whether to grant or refuse bail:

- It will be in the interests of justice to refuse bail where it is established that if the accused is granted bail he is likely:
  - to endanger public safety or the safety of an individual person;
  - to commit a First Schedule crime;
  - not to stand trial;
  - to try to intimidate witnesses or interfere with the evidence; or
  - to "undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system" (whatever that means).<sup>26</sup>
- It will also be in the interests of justice to refuse bail if "in exceptional circumstances"<sup>27</sup> it is likely that the release of the accused will disturb public order or undermine public peace or security. It seems that this ground for refusing bail is intended to cover crimes that cause shock or outrage to the community, or cases where the public might feel uneasy or unsafe if the accused were let out on bail.<sup>28</sup>
- The court must balance the interests of justice against the right of the accused to personal freedom, taking into account the following, amongst other factors:
  - the period the accused has already spent in custody and the period he is likely to spend before his trial;
  - any delay in bringing him to trial, and whether he is to blame for any such delay;
  - any prejudice he may suffer in preparing his defence if he remains in custody;
  - the state of his health.

There are various other restrictions on the grant of bail:

---

<sup>25</sup> In particular, section 60 of that Act.

<sup>26</sup> Section 117(2)(a) of the Criminal Procedure and Evidence Act.

<sup>27</sup> Again, whatever that means.

<sup>28</sup> See section 117(3)(e).

- Accused persons who have been arrested on a charge of committing a crime set out in the Third and Ninth Schedules to the Criminal Procedure and Evidence Act must be remanded without bail for 21 days (the requirements for this have been dealt with above on page 61 of these notes).
- If an accused person is charged with a crime set out in Part I of the Third Schedule to the Criminal Procedure and Evidence Act, he must satisfy the court that exceptional circumstances exist justifying his release, before the court can grant him bail.<sup>29</sup>
- Accused persons who have been committed for trial in the High Court can only be granted bail by that court. If however a magistrate has granted them bail before their committal the bail stands unless a judge alters or revokes it.<sup>30</sup>
- Where an accused person has been extradited to Zimbabwe from a foreign country in order to stand trial here, and the Minister responsible for administering the Extradition Act [*Chapter 9:08*] certifies that he has given an undertaking to the foreign country concerned that the person will not be granted bail, or will be granted bail subject to certain conditions, the court must refuse that person bail, or grant it subject to those conditions, as the case may be.<sup>31</sup>

As indicated above, these provisions are unconstitutional in so far as they allow a person to be denied bail in the absence of compelling reasons for such denial.

It is undesirable that accused persons should be deprived of their liberty if the sentence likely to be imposed will be a fine or another non-custodial sentence.

Each case must be decided on its merits, and the prosecutor must make an independent assessment of the case and should not blindly follow the recommendations of the police as to the grant or refusal of bail. Similarly, the court must consider each case and not act as a rubber stamp.

### ***Onus of proof***

Generally, the onus of showing that bail should not be granted rests with the prosecution, where bail is sought before the accused person has been found guilty.<sup>32</sup> As Mathonsi J said in *S v Munsaka* 2016 (1) ZLR 427 (H), the onus of proving compelling reasons for not granting bail lies on the State. The degree of proof required is a balance of probabilities. Under section 115C of the Criminal Procedure and Evidence Act however the onus is shifted to the accused where he is charged with a crime listed in Part I of the Third Schedule to the Act (some of them are listed above, in the section headed “Who may grant bail”). In that event the accused bears the onus of showing, on a balance of probabilities, that it is in the interests of justice for him to be admitted to bail.<sup>33</sup> Where the accused is charged with a crime listed in Part II of that Schedule (premeditated murder, murder of a police officer, serious rape or indecent assault, indecent assault of a child, crimes involving terrorism) he must go further and show, again on a balance of probabilities, that exceptional circumstanc-

---

<sup>29</sup> Section 117(6)(a) of the Criminal Procedure and Evidence Act.

<sup>30</sup> Section 65(2a) of the Criminal Procedure and Evidence Act.

<sup>31</sup> Section 117(8) of the Criminal Procedure and Evidence Act. The provision is intended to ensure that criminals who are in custody in a foreign country are not freed on bail when they are extradited to Zimbabwe.

<sup>32</sup> Section 115C(2) of the Criminal Procedure and Evidence Act. See also *S v Chiadzwa* 1988 (2) ZLR 19 (S).

<sup>33</sup> Section 115C(2)(a)(ii)A of the Criminal Procedure and Evidence Act.

es exist permitting him to be released.<sup>34</sup> It is doubtful if these provisions of section 115C are constitutional.

It is not sufficient for the prosecutor to make bald assertions that a particular ground for refusing bail exists; he must show that his assertions are well founded. Simply alleging that the accused will abscond, will endanger the public or will interfere with witnesses, without substantiating such allegations, does not meet the threshold of compelling reasons set by the Constitution.<sup>35</sup> In *S v Kuruneri* 2004 (1) ZLR 409 (H), Hlatshwayo J (as he then was) said that there was no basis for the view that the accused person has an onus to discharge to enable him to be admitted to bail. The presumption of innocence operates fully in bail applications made before the accused has been found guilty, and so the court is expected and required to lean in favour of the liberty of the accused. If the State's fears that the accused will abscond or interfere with witnesses are equally balanced against the accused's assurances to the contrary, then the presumption of innocence requires the court to lean in favour of the accused's liberty and grant bail. In other words, if the State opposes bail it must prove that justice will be served by denying bail.<sup>36</sup> The view expressed in *Kuruneri's* case is clearly correct, though now that section 50(1)(d) of the Constitution provides that arrested persons must be released pending trial unless there are "compelling reasons justifying their continued detention", the State's onus is heavier: it must prove the existence of those compelling reasons.

Once, however, the prosecution has made credible allegations against the accused which would provide grounds for refusing bail, the onus shifts to the accused person, who must show on a balance of probabilities that his admission to bail would not prejudice the interests of justice.<sup>37</sup>

## Methods of Granting Bail

Bail may be granted in two ways:

### ***Deposit of money or property***

The accused may be permitted to deposit a sum of money or any other property (e.g. title deeds to his house) as security for his appearing in court for his trial.<sup>38</sup> This is by far the most common way in which accused persons are granted bail.

### ***Recognizances***

Alternatively, the accused (and, sometimes, one or more sureties) may be required to enter into recognizances, i.e. a written undertaking or bond by which they agree to pay the court a specified sum of money if the accused fails to comply with the conditions of his bail.

If sureties have entered into a recognizance they will generally remain liable on it until the accused is sentenced or discharged, but they can apply to the court which granted bail to be released from the recognizance. In that event, the court will issue a warrant of arrest for the accused, and when the accused comes to court the judge or magistrate will discharge the

---

<sup>34</sup> Section 115C(2)(a)(ii)B of the Criminal Procedure and Evidence Act.

<sup>35</sup> *S v Munsaka* HB-55-2016.

<sup>36</sup> Headnote to *S v Kuruneri* 2004 (1) ZLR 409 (H).

<sup>37</sup> *Kuruneri's* case *supra*. Or rather, to conform with section 50(1)(d) of the Constitution, he must show that the allegations put forward by the prosecution do not amount to compelling reasons justifying his continued detention.

<sup>38</sup> Section 131 of the Criminal Procedure and Evidence Act.

surety and require the accused to find another person to stand as surety; if the accused fails to do so he may be committed to prison.<sup>39</sup> Alternatively, the surety may get his discharge from the recognizance by bringing the accused person to court; in that event the accused may be committed to prison or granted bail on fresh conditions.<sup>40</sup>

## **Bail Conditions**

The essential condition of bail is that the accused must appear in court at the appointed times and places until the proceedings against him are completed.<sup>41</sup> Further conditions are usually added to ensure that the accused complies with the main condition. The court's power to impose such conditions is very wide,<sup>42</sup> and they may include: the surrender by the accused of his passport; reporting to the police at regular intervals; a prohibition against his communicating with witnesses for the prosecution.

Conditions must be practically feasible<sup>43</sup> and should be neither vague nor ambiguous.

## **Amount of Bail**

The amount of bail taken in any case, whether in the form of a deposit or a recognizances, is in the discretion of the court, but excessive bail must not be fixed.<sup>44</sup> What is excessive in any particular case will depend on the financial resources of the accused person, so these must be investigated carefully by the court. When fixing the amount of bail, the court must reconcile the twin objectives of allowing the accused to be at liberty, while ensuring that he is sufficiently motivated to appear in court when required.

## **Amendment or Withdrawal of Bail**

If new facts are brought to the attention of a judge or magistrate as a result of which he considers it necessary or advisable in the interests of justice to amend or add to the conditions of bail, he may do so. He may also order that the accused be committed to prison and issue a warrant for his arrest.<sup>45</sup>

## **Breach of Conditions of Bail**

If an accused person breaches or is believed likely to breach his conditions of bail, there are three remedies:

1. If the accused fails to appear at his trial after his name has been called three times outside the court, the court, on the application of the prosecutor, can issue a warrant for his arrest and declare the recognizance or the money deposited as bail to be forfeited to the State.<sup>46</sup>
2. If a peace officer believes on reasonable grounds that the accused is about to abscond to evade justice, or is about to interfere with evidence, the peace officer may

---

<sup>39</sup> Section 128 of the Criminal Procedure and Evidence Act.

<sup>40</sup> Section 129 of the Criminal Procedure and Evidence Act.

<sup>41</sup> Section 118(1) of the Criminal Procedure and Evidence Act.

<sup>42</sup> Section 118(3) of the Criminal Procedure and Evidence Act.

<sup>43</sup> *R v Fourie* 1947 (2) SA 574 (O).

<sup>44</sup> Section 120 of the Criminal Procedure and Evidence Act. To fix excessive bail amounts to a refusal of bail: *S v Shaban* 1965 (4) SA 646 (W).

<sup>45</sup> Section 126 of the Criminal Procedure and Evidence Act.

<sup>46</sup> Section 119(2) of the Criminal Procedure and Evidence Act.

arrest the accused and take him before a magistrate as soon as possible, and in any event within 48 hours. The magistrate may commit the accused to prison.<sup>47</sup>

3. If it appears to a judge or magistrate that an accused person has breached the conditions of his bail (e.g. does not report to the police), he may order the accused's recognizance to be forfeited and issue a warrant for the accused's arrest.<sup>48</sup> Presumably, before making the declaration of forfeiture in such circumstances he must give the accused an opportunity to make representations.

## **Appeal against Grant or Refusal of Bail**

### ***Appeal by accused against decision of magistrate***

An accused person may appeal to a judge of the High Court at any time against a magistrate's refusal to grant him bail, or against the amount of bail or conditions of bail fixed by a magistrate.<sup>49</sup> The appeal does not suspend the decision,<sup>50</sup> so the accused will remain in custody pending the result of the appeal.

The appeal must be in writing and must give sufficient particulars to identify the decision that is the subject of the appeal and must state the grounds on which the decision is appealed against.<sup>51</sup> A copy of the written statement of appeal must be served on the Prosecutor-General, and the appeal must be set down within 96 hours after it is filed with the Registrar of the High Court.

The judge has wide powers on appeal, equivalent to those of the magistrate whose decision is the subject of the appeal, and the appeal amounts to a rehearing: it is an appeal in the wide sense, and the judge can substitute his own discretion for that of the magistrate.<sup>52</sup>

There is no further appeal to the Supreme Court from a decision of a judge of the High Court on appeal, unless the accused person has been charged with any of the following crimes<sup>53</sup>

- subverting constitutional government (section 22 of the Criminal Law Code); or
- crimes relating to insurgency, banditry, sabotage or terrorism (sections 23 to 29 of the Criminal Law Code); or
- an economic crime set out in the Ninth Schedule to the Criminal Procedure and Evidence Act.

In such a case, either the accused person or the Prosecutor-General can appeal to the Supreme Court against a decision of a judge of the High Court on appeal.

---

<sup>47</sup> Section 127 of the Criminal Procedure and Evidence Act.

<sup>48</sup> Section 133 of the Criminal Procedure and Evidence Act.

<sup>49</sup> Section 121 of the Criminal Procedure and Evidence Act.

<sup>50</sup> Section 121(4) of the Criminal Procedure and Evidence Act.

<sup>51</sup> Section 6 of the High Court of Zimbabwe (Bail) Rules, 1991 (SI 109 of 1991).

<sup>52</sup> *S v Ruturi (1)* 2003 (1) ZLR 259 (H).

<sup>53</sup> Section 121(8) of the Criminal Procedure and Evidence Act; cp *S v Dzawo* 1998 (1) ZLR 536 (S). The effect, indeed the validity, of the subsection is doubtful. It refers to a crime "referred to in paragraph 10 of the Third Schedule" to the Act, but the Third Schedule has since been amended and there is no longer a paragraph 10. Furthermore, the crimes concerned, which were set out in the Public Order and Security Act, are now contained in Chapter III of the Criminal Law Code.

### ***Appeal by accused against decision of judge***

An accused person who has been refused bail by a judge, or who is aggrieved by conditions of bail imposed by a judge acting as a court of first instance, may appeal to a judge of the Supreme Court.<sup>54</sup> Leave to appeal must first be obtained from the judge or, if he refuses it, from a judge of the Supreme Court.<sup>55</sup> As with an appeal against a magistrate's decision, the appeal does not suspend the decision appealed against.

The procedure to be followed in such appeals is the same as that for appeals to the High Court against decisions of magistrates on bail,<sup>56</sup> and the Supreme Court's power on appeal are the same as those of the High Court in such appeals. In other words, the appeal amounts to a rehearing and the Supreme Court can substitute its own discretion for that of the judge of the High Court. This is because section 121(5) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] makes no distinction between appeals to the High Court and appeals to the Supreme Court. Earlier cases, such as *S v Chikumbirike* 1986 (2) ZLR 145 (S) at 164<sup>57</sup>, which held that the Supreme Court will interfere with a decision of a judge in a bail application only if the judge committed an irregularity or misdirection or exercised his discretion so unreasonably or improperly as to vitiate his decision, no longer reflect the current law.

### ***Appeal by Prosecutor-General against bail decisions***

The Prosecutor-General may appeal against a decision made by a judge or magistrate in regard to bail.<sup>58</sup> Where he appeals against a magistrate's decision, the appeal lies to a judge of the High Court; where he appeals against a decision of a judge of the High Court, the appeal lies to a judge of the Supreme Court. As with an appeal by an accused person, leave must be obtained before an appeal against a decision of a judge is noted.

If the Prosecutor-General wants to appeal against a grant of bail, he must do so within 48 hours after the decision to grant bail.<sup>59</sup> After he has noted his appeal the decision to grant bail remains in force unless, on the application of the Prosecutor-General or a public prosecutor, the judge or magistrate suspends the decision on being satisfied that there is a reasonable possibility that the interests of justice may be defeated if the accused person is released.

The procedure to be followed in appeals by the Prosecutor-General is the same as the procedure to be followed in appeals by accused persons.

As with appeals by accused persons against decisions of magistrates, there is no further appeal to a judge of the Supreme Court against a decision of a judge of the High Court on appeal, unless the accused is charged with certain serious crimes (as to which, see above).

---

<sup>54</sup> Section 121(1) & (2) of the Criminal Procedure and Evidence Act.

<sup>55</sup> Cp *S v Aitken* 1992 (2) ZLR 84 (S) at 87 and *S v Dzawo* 1998 (1) ZLR 536 (S).

<sup>56</sup> Section 6 of the Supreme Court of Zimbabwe (Bail) Rules, 1991 (SI 290 of 1991).

<sup>57</sup> Erroneously followed in *S v Chivhayo* S-94-2005 and *S v Kuruneri* S-35-2006.

<sup>58</sup> Section 121 of the Criminal Procedure and Evidence Act.

<sup>59</sup> Section 121(1)(a) of the Criminal Procedure and Evidence Act. The section does not say whether the accused person must remain in custody until the 48-hour period has expired; presumably not.

## Bail Granted by Police

It is a fundamental principle that the courts, not the Executive (i.e. the police) should decide whether or not a person who is awaiting trial should be granted bail or be kept in custody.<sup>60</sup> Nevertheless, if a suspect has been arrested on a relatively minor charge and is unlikely to abscond or interfere with the evidence, or to commit further crimes, it is obviously desirable for him to be granted bail as soon as possible, even if a magistrate is not immediately available to hear his application for bail.

Hence section 132 of the Criminal Procedure and Evidence Act states that a police officer of or above the rank of Assistant Inspector, or a police officer in charge of a police station, can grant an arrested suspect bail if no judicial officer is available, so long as the suspect is not charged with a crime specified in the Fifth Schedule to the Act, namely:

- Murder
- Rape or aggravated indecent assault
- Robbery
- Assault in which a dangerous injury is inflicted
- Malicious damage to property committed in aggravating circumstances as provided in section 143 of the Criminal Law Code (i.e. if it is committed with fire or explosives, or causes considerable loss, or is committed against State property).
- Unlawful entry into premises committed in aggravating circumstances as provided in section 131 (2) of the Criminal Law Code (i.e. if the accused entered a dwelling, or used violence, or committed some other crime — e.g. theft)
- Theft, making off without payment, receiving any stolen property knowing it to have been stolen, fraud or forgery, if the amount or value involved in any such crime exceeds five hundred thousand dollars.
- Stock theft.
- Any crime under any enactment relating to the unlawful possession of, or dealing in, precious metals or precious stones.
- Any crime relating to the coinage or banknotes.
- Contravening section 20, 21, 22, 23, 24, 25, 26, 27 or 29 of the Criminal Law Code (i.e. treason, subverting constitutional government or crimes involving insurgency, banditry, sabotage or terrorism).
- A conspiracy, incitement or attempt to commit any of the above crimes

Although section 132 of the Act does not say so expressly, a police officer cannot grant bail after the accused person's first appearance in court; this limitation is essential to ensure that courts remain in direct and exclusive control over release on bail once the case is on the court roll.

Police officers should be prepared to grant bail in proper cases.<sup>61</sup> As stated by Reid Rowland *Criminal Procedure in Zimbabwe* p. 6-3:

“[S]ince the Act gives the authority to police officers to grant bail, they should not shirk their responsibility for deciding the question of bail on the pretext that a judicial officer will be available at some time in the future. Nor should a police officer take the line that he is not

---

<sup>60</sup> *Bull v Minister of Home Affairs* 1986 (3) SA 870 (ZH) at 871E.

<sup>61</sup> *Coetzee v National Commissioner of Police & Ors* 2011 (2) SA 227 (GNP) at 239.

qualified to decide such matters. By virtue of his rank or appointment, he *is* qualified. If the accused requests bail and the offence is one in respect of which a police officer may grant bail, the police officer should give proper consideration to the request.”

It has been suggested that an action for damages will lie against a police officer who refuses police bail on malicious grounds, or where a properly authorised police officer has simply refused to exercise his discretion.<sup>62</sup>

A police officer may accept a deposit of bail money; he has no power to accept sureties.

---

<sup>62</sup> *Shaw v Collins* (1883) 2 SC 389, cited in Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 169.

## 6. SEARCH AND SEIZURE

An important power given to the Police is that of search and entry of premises and the seizure of articles required for a trial.

All searches are *prima facie* unlawful and the onus is on the person conducting the search to justify it.<sup>1</sup>

### Search of a Person on Arrest

As indicated above, a peace officer or private person making an arrest may search the arrested person and, if he does so, must keep in safe custody all articles found as a result of the search.<sup>2</sup> If the person making the arrest is not a police officer, he must deliver the articles to a police officer.<sup>3</sup>

A police officer to whom articles are delivered must provide a full receipt for the articles; failure to do so entitles the owner of the articles to have them returned to him or her unless they are articles whose possession is intrinsically unlawful (e.g. dangerous drugs).<sup>4</sup>

If a woman is searched, the search must be made by a medical practitioner or by a woman and must be made with strict regard to decency.<sup>5</sup> So, indeed, must any search.<sup>6</sup>

### Search With and Without Warrant

Like arrests, searches can be effected with or without a warrant. Unlike the case of arrests, however, the law encourages the police to conduct searches with a warrant rather than without.

#### ***Search and seizure of articles with warrant***

What may be seized

Certain articles<sup>7</sup> may be seized by virtue of a search warrant in terms of section 49 of the Criminal Procedure and Evidence Act. These articles are<sup>8</sup>:

- articles concerned in or on reasonable grounds believed to be concerned in the commission or suspected commission of a crime in Zimbabwe or elsewhere;<sup>9</sup>
- articles which it is on reasonable grounds believed may afford evidence of the commission of a crime in Zimbabwe or elsewhere;<sup>10</sup>

---

<sup>1</sup> *S v Pogrand* 1974 (1) SA 244 (T) at 247.

<sup>2</sup> Sections 41(2) and 49 of the Criminal Procedure and Evidence Act.

<sup>3</sup> Section 52(1) of the Criminal Procedure and Evidence Act.

<sup>4</sup> Section 52(2) of the Criminal Procedure and Evidence Act.

<sup>5</sup> Section 41(4) of the Criminal Procedure and Evidence Act.

<sup>6</sup> Section 57 of the Criminal Procedure and Evidence Act.

<sup>7</sup> This term is defined widely in section 47 of the Criminal Procedure and Evidence Act as including documents and substances.

<sup>8</sup> Section 49 of the Criminal Procedure and Evidence Act.

<sup>9</sup> There is no requirement that the owner of the articles must be the perpetrator of the crime; he or she may be a victim.

<sup>10</sup> Section 49(b) of the Criminal Procedure and Evidence Act.

- articles which are intended or on reasonable grounds are believed to be intended to be used in the commission of a crime.

Other statutes (in particular the Customs and Excise Act, the Dangerous Drugs Act, the Medicines and Allied Substances (Control) Act and the Precious Stones Trade Act) allow other articles to be seized.

Documents which are privileged, e.g. documents that record communications between a lawyer and his client, may not be seized.<sup>11</sup> Such documents may not be handed over without the consent of the client. If the State were able to seize such documents the whole object of privilege would be defeated.<sup>12</sup>

### Issue of search warrant

A search warrant may be issued before trial by a magistrate or justice of the peace (other than a justice of the peace who is a police officer).<sup>13</sup> A judge has no power to issue a search warrant, except during the course of a criminal trial. Information must be given on oath, and the information must give the magistrate or justice reasonable grounds for believing that an article which may be seized is in the possession of or under the control of a person, or on or in property, within the area of jurisdiction of the magistrate or justice. Note that, unlike a warrant of arrest, it is not enough for the applicant to say that he has reasonable grounds for such a belief: he must communicate that belief to the magistrate or justice.<sup>14</sup>

A judge or magistrate may issue a search warrant during trial if he considers that an article that may be seized is required in evidence in the proceedings. There is no need for information to be given on oath before such a warrant is issued, nor need the article be within the magistrate's area of jurisdiction.<sup>15</sup>

Anyone may apply for a search warrant, though normally only police officers do so.<sup>16</sup>

### Form of and requirements for search warrant

A search warrant requires a police officer (not a peace officer) to seize the property named or identified in the warrant. The police officer has no discretion in the matter; he must execute the warrant. The warrant authorises the police officer to search any person identified in the warrant or to enter and search premises identified in the warrant or within an area identified in the warrant, and to search any person found there.<sup>17</sup>

A search warrant must:

---

<sup>11</sup> The South African case of *Andresen v Minister of Justice* 1954 (2) SA 473 (W), which held that privileged documents could be seized, was probably wrongly decided. See *Sasol III (Edms) Bpk v Minister van Wet en Orde & Anor* 1991 (3) SA 766 (T) and *Jeeva & Ors v Receiver of Revenue, Port Elizabeth, & Ors* 1995 (2) SA 433 (SE) at 452 and the cases there cited.

<sup>12</sup> Cf *Prinsloo v Newman* 1975 (1) SA 481 (A) at 493F-G.

<sup>13</sup> Section 50(1) of the Criminal Procedure and Evidence Act.

<sup>14</sup> See section 50 of the Criminal Procedure and Evidence Act.

<sup>15</sup> Section 50(1)(b) of the Criminal Procedure and Evidence Act.

<sup>16</sup> The Anti-Corruption Commission is given power by paragraph 2 of the Schedule to the Anti-Corruption Commission Act [*Chapter 9:22*] to obtain search warrants from magistrates or justices. It is submitted that this does not give the Commission or its officers power to execute search warrants (i.e. to search premises or persons in terms of these warrants); only police officers can do that.

<sup>17</sup> Section 50(2) of the Criminal Procedure and Evidence Act.

- state whether it is to be executed by night (if that is the intention); otherwise it may be executed only by day;<sup>18</sup>
- describe precisely the premises or persons to be searched – though the premises can be described as being within an area identified in the warrant<sup>19</sup>;
- specifically state the articles to be searched for. If the warrant is phrased only in general terms, it will be invalid.<sup>20</sup>

Generally, a search warrant must be sufficiently precise as to lead to the correct identification of the property, persons and premises to be searched and to preclude the possibility of the wrong property being seized or the wrong person or premises being searched. It must be reasonably intelligible to both the searcher and the searched person. Warrants that are too vague or wide will be set aside wholly or in part.

Search warrants are to be interpreted reasonably strictly, to protect the individual against excessive interference by the State.<sup>21</sup>

It is desirable, though not legally necessary, for a search warrant to have a preamble or recital setting out the reason why the warrant is being issued and the statutory provisions authorising its issue. A preamble:

“apprises the occupier whose premises are searched of the reason for the encroachment on his rights and thus may tend to allay resentment and prevent obstruction of the police.”<sup>22</sup>

A preamble also, of course, apprises the police of the extent of their powers. If there is a preamble which sets out statutory provisions, it should follow the wording of the statute precisely.

A warrant should also specify the alleged crime that gives rise to its issue, and the alleged offender; failure to do so will invalidate it.<sup>23</sup>

### Execution of search warrant

A search warrant is “executed” when the search or seizure authorised by it is carried out. A warrant must be executed by day unless the person issuing it authorises in writing its execution by night.<sup>24</sup>

If the person affected by the warrant so demands, the police officer executing the warrant must, either before or after it is executed, hand him a copy of it.<sup>25</sup> Ideally, the warrant should be shown to the person before the search, to allow him to obtain an interdict if the search is unlawful; it should also be shown to the person whether or not he demands to see it. Many people are unaware of their right to see the warrant and will not ask to see it.

---

<sup>18</sup> Section 50(3)(b) of the Criminal Procedure and Evidence Act.

<sup>19</sup> Section 50(2)(a) of the Criminal Procedure and Evidence Act.

<sup>20</sup> *Elliott v Commissioner of Police* 1986 (1) ZLR 228 (H), where it was held that a warrant which authorised the seizure of “subversive documents” was too vague.

<sup>21</sup> *Minister of Safety & Security v van der Merwe & Ors* 2011 (5) SA 61 (CC) and *NUSAS v Divisional Commissioner, S.A. Police* 1971 (2) SA 553 (C).

<sup>22</sup> *Minister of Justice & Ors v Desai NO* 1948 (3) SA 395 (A) at 405.

<sup>23</sup> *Minister of Safety & Security v van der Merwe & Ors* 2011 (5) SA 61 (CC). The Criminal Procedure and Evidence Act does not specifically require this, however.

<sup>24</sup> Section 50(3)(b) of the Criminal Procedure and Evidence Act.

<sup>25</sup> Section 50(4) of the Criminal Procedure and Evidence Act.

A police officer who seizes or removes articles under a search warrant must issue a receipt for them and give it to their owner or possessor; a police officer who fails to do so is guilty of a crime and liable to a fine of level 4 or up to three months' imprisonment.<sup>26</sup>

A police officer may use such force as is reasonably necessary in order to overcome any resistance against a search or entry of premises, and may break down a door or window to effect entry. Before doing so, however, he must audibly demand admission to the premises and state why he wants to enter them — unless he is reasonably of the opinion that to do so will lead to the destruction or disposal of the article that is being searched for.<sup>27</sup> The use of force in such circumstances does not extend to the killing of persons who resist a search or entry of premises.<sup>28</sup>

### ***Search without warrant***

Wherever possible, searches should be conducted in terms of a warrant, because the procedure of obtaining a warrant serves to protect, to some extent, the rights of the individual. The law does, however, permit searches to be conducted without a warrant in certain circumstances.

A police officer (not a peace officer) may search a person, container or premises for the purpose of seizing an article referred to in section 49 of the Criminal Procedure and Evidence Act (see above):

- with the consent of the person concerned;
- if the police officer believes on reasonable grounds that a search warrant would be issued to him if he applied for one, and that delay in obtaining a warrant would prevent the seizure of the article or defeat the object of the search.<sup>29</sup>

A police officer who conducts a search in the second of the above circumstances (i.e. without consent) must, if asked by anyone whose rights are affected by the search, inform that person of his or her name, rank and force number and of the reasons for carrying out the search without a warrant. If the police officer fails to do so, he or she will be guilty of a crime and liable to a fine of level 4 or up to three months' imprisonment.<sup>30</sup>

A private person may not normally search people except as part of an arrest, but an occupier of land may search any premises or person on the land if he reasonably suspects that stolen stock or produce, or illicit drink, drugs, firearms, ammunition or explosives are in the premises or under the control of the person concerned.<sup>31</sup> He may do so, however, only if a police officer is not readily available.

Both police officers and private persons may search premises in order to find and arrest a suspect whom they are authorised to arrest, if they know or suspect the person to be in the premises.<sup>32</sup>

And a police officer investigating a crime may enter premises without a warrant for two reasons. Firstly, to interrogate and take a statement from a person whom he reasonably

---

<sup>26</sup> Section 49(2), (3) & (4) of the Criminal Procedure and Evidence Act.

<sup>27</sup> Section 55 of the Criminal Procedure and Evidence Act.

<sup>28</sup> See the earlier discussion of killing in order to effect an arrest.

<sup>29</sup> Section 51(1) of the Criminal Procedure and Evidence Act.

<sup>30</sup> Section 51(4) & (5) of the Criminal Procedure and Evidence Act.

<sup>31</sup> Section 53 of the Criminal Procedure and Evidence Act.

<sup>32</sup> Section 40 of the Criminal Procedure and Evidence Act.

suspects is on the premises and can give information about the crime.<sup>33</sup> He may not, however, enter a dwelling for this purpose without the occupier's consent. Secondly, a police officer of or above the rank of inspector may enter premises to inspect books, documents or records and may make copies of them.<sup>34</sup> He may not, however, take possession of them without a warrant. A police officer who exercises these powers must, on demand by anyone whose rights are affected by the powers, inform the person of his or her name, rank and force number and the reasons for exercising the powers. An officer who fails to do so is guilty of a crime and liable to a fine of level 4 or imprisonment for up to three months.<sup>35</sup>

A police officer who seizes or removes articles following a search without a warrant must issue a receipt for them and give it to their owner or possessor; a police officer who fails to do so is guilty of a crime and liable to a fine of level 4 or up to three months' imprisonment.<sup>36</sup>

Force may be used to effect a search without a warrant in the same circumstances and to the same extent as in the case of search with a warrant.

What has been said above is laid down in the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Other statutes confer powers of search on particular officers, for example customs officers (the Customs and Excise Act), parks officers (the Parks and Wild Life Act) and drugs inspectors (the Dangerous Drugs Act). This last Act – the Dangerous Drugs Act – goes further and actually limits the power of police officers. Only police sergeants or more senior officers may search persons and premises for dangerous drugs; police constables may do so only if authorised to do so in writing by a more senior officer.<sup>37</sup>

### **Effect of Unlawful Search**

Evidence obtained as a result of an unlawful search is inadmissible if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.<sup>38</sup>

In South Africa, where there is a similar constitutional provision,<sup>39</sup> the courts have held that where there has been a deliberate and conscious violation of constitutional rights by the State or its agents, evidence obtained by such a violation should in general be excluded, though there may be certain extraordinary excusing circumstances which may warrant its admission.<sup>40</sup> In Zimbabwe, however, section 258A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] seems to be an attempt to limit the application of section 70(3) of our Constitution. It says that when deciding whether to exclude illegally-obtained evidence a court must balance the rights of the accused and the need to protect the criminal justice system against serious or persistent breaches of the law, on the one hand, and the public interest in doing justice to victims and upholding public confidence in the effectiveness of the system, on the other. The section goes on to say that it is only serious or persistent

---

<sup>33</sup> Section 54(1) of the Criminal Procedure and Evidence Act.

<sup>34</sup> Section 54(2) of the Criminal Procedure and Evidence Act.

<sup>35</sup> Section 54(3) & (4) of the Criminal Procedure and Evidence Act.

<sup>36</sup> Section 49(2), (3) & (4) of the Criminal Procedure and Evidence Act.

<sup>37</sup> Section 14D of the Dangerous Drugs Act [*Chapter 15:02*].

<sup>38</sup> Section 70(3) of the Constitution. Before the Constitution came into force such evidence was generally admissible: *R v Mabuya* 1927 CPD 181.

<sup>39</sup> Section 35(5) of the Constitution of South Africa.

<sup>40</sup> *S v Motloutsi* 1996 (1) SA 584 (C), following the Irish case of *People (Attorney-General) v O'Brien* [1965] IR 142.

breaches of substantive rather than procedural rights<sup>41</sup> that will justify the interests of the accused prevailing over the public interest in doing justice to victims and upholding public confidence in the justice system; and similarly, only compelling reasons will justify the accused's interests prevailing over the public interest. The section says further that if a court admits illegally-obtained evidence after balancing those considerations the trial must not be regarded as unfair. Even though the section can only apply where a court balances the considerations correctly, the section is still unconstitutional because it is not for Parliament to dictate whether or not a trial is unfair: that is for the courts to decide in each particular case.

It is not clear if a person is entitled to resist an unlawful search in the same way that he can forcibly resist a wrongful arrest. He probably can do so if he believes on reasonable grounds that the search is a violation of his right to privacy.

### **Subsequent Disposal of Seized Articles**

According to section 58 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a police officer who seizes articles, or who receives seized articles from someone other than a police officer who has seized them, must take them to a place of security under the control of a police officer and enter in an inventory their particulars and particulars of how they were seized. The articles must be kept safe in that secure place until criminal proceedings relating to the article have been concluded or abandoned or discontinued. If the accused person has not been convicted in those proceedings then the articles must be returned to their owner unless they are articles whose possession is intrinsically unlawful.

If articles whose possession is intrinsically unlawful have been seized by a police officer, he or she must as soon as possible notify the police officer in command of the police district where the articles are being held.<sup>42</sup>

If an article is perishable or hazardous to health, the police officer may either return it to its owner or the person to whom a receipt was given, or dispose of it or destroy it in such manner as the circumstances may require after giving its owner or possessor at least 14 days' notice of the disposal or destruction.<sup>43</sup> If the owner or possessor objects, the police officer must get a warrant of destruction or disposal from a magistrate or from a justice of the peace who is not a police officer.<sup>44</sup>

If an article is stolen or suspected of being stolen, a police officer may, with the consent of the person from whom it was seized,<sup>45</sup> deliver it to the person from whom the officer believes it was stolen, to be held pending the trial.<sup>46</sup>

If no prosecution is initiated<sup>47</sup> within 21 days after an article was seized, then the article must be returned to the place from which it was taken unless it is an article whose possession is intrinsically unlawful. If its return is impracticable, the person concerned must be

---

<sup>41</sup> It is not all clear what the distinction between these rights is, or why the breach of "procedural rights" should never be allowed to justify a court refusing to admit illegally-obtained evidence.

<sup>42</sup> Section 63A(1) of the Criminal Procedure and Evidence Act.

<sup>43</sup> Section 58(3) of the Criminal Procedure and Evidence Act.

<sup>44</sup> Section 58(5) of the Criminal Procedure and Evidence Act.

<sup>45</sup> The person's consent is necessary in case his rights are prejudiced by handing the property to the original owner.

<sup>46</sup> Section 58(2) of the Criminal Procedure and Evidence Act.

<sup>47</sup> i.e. if no summons is issued or statement of charge lodged or indictment served (section 58A(1) of the Criminal Procedure and Evidence Act).

notified that he or she can collect it from the police. If, however, within 72 hours before the 21-day period expires, the person is served with a notice of continued retention and either he or she does not object or his or her objections are rejected by a magistrate or justice of the peace (other than a police officer) then the police may continue to keep the article until criminal proceedings have been concluded, abandoned or discontinued.<sup>48</sup>

Section 59 of the Criminal Procedure and Evidence Act says that if no criminal proceedings are instituted, or the seized article is not required at the trial, or the accused person admits guilt and pays a deposit fine, then the article must be returned to the person from whom it was seized (if he may lawfully possess it); or if he is not allowed to possess it, to the person who may; or if no one may lawfully possess it or the police officer knows of no one who may, then it is forfeited to the State.<sup>49</sup> The police must send a registered letter notifying the person who may lawfully possess the article that he may collect it, and if he fails to do so within three months it is forfeited to the State.<sup>50</sup>

At the conclusion of criminal proceedings, the judge or magistrate may order that any article seized under the above provisions be returned to the person from whom it was taken, if that person may lawfully possess it; or that it be returned to anyone else who is lawfully entitled to it, if that person may lawfully possess it; or if no one is entitled to possess it, that it should be forfeited to the State.<sup>51</sup> The mere fact that the accused is acquitted does not mean that he is automatically entitled to have the article returned to him.<sup>52</sup> And a complainant is not entitled to be awarded goods purchased with stolen money — the goods are the property of the accused.<sup>53</sup>

Articles whose possession is intrinsically unlawful – for example, dangerous drugs – are destroyed or disposed of in terms of section 63A of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. This is done in the presence of the Prosecutor-General or his or her representative, as well as representatives of any agency with statutory responsibility for the article (for example, in the case of rhino horns, the Parks and Wild Life Management Authority).

Where an article has been forfeited to the State under section 59, a person claiming that it was his property may apply to a magistrate, within three years, for its return. The magistrate may order the police to return the article or, if it has been disposed of, may order that the applicant be paid adequate compensation.<sup>54</sup> The applicant may, however, be ordered to pay the police their costs incurred in keeping the article if the applicant was unduly dilatory or negligent in reclaiming it.<sup>55</sup>

---

<sup>48</sup> Section 58A of the Criminal Procedure and Evidence Act.

<sup>49</sup> Section 59(1) of the Criminal Procedure and Evidence Act.

<sup>50</sup> Section 59(2) of the Criminal Procedure and Evidence Act.

<sup>51</sup> Section 61(1) of the Criminal Procedure and Evidence Act.

<sup>52</sup> Lansdown & Campbell S.A. *Criminal Law & Procedure* vol 5 p. 165 and the cases there cited.

<sup>53</sup> *R v Munene* 1956 R & N 432 (SR).

<sup>54</sup> Section 59(3) of the Criminal Procedure and Evidence Act.

<sup>55</sup> Section 59(6) of the Criminal Procedure and Evidence Act.

## 7. JUDICIAL OFFICERS

### Judicial officer's conduct

Once the accused has pleaded and the trial proceeds, the conduct of the trial is managed by the presiding judge or magistrate in accordance with procedural rules laid down in the Criminal Procedure and Evidence Act. All orders given by him for the proper conduct of the trial must be obeyed by the parties, the court staff and the public.

A trial must be conducted fairly:

“A long line of cases shows that it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done ... The rule is that nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.”<sup>1</sup>

So a judicial officer must be fair, objective and impartial, and must avoid any conduct that may create the impression that he is biased either for or against the accused. He must be honest and upright, patient and understanding. He must be prompt and businesslike in the performance of his duties. He must apply the law as it is, not as he thinks it ought to be. He must avoid extravagant and emotional language while on the bench.<sup>2</sup> He must ensure that witnesses and accused persons are treated courteously by the court, the defence and the prosecution.<sup>3</sup>

It is desirable for a judicial officer to avoid communicating with either party to a case except in the presence of the other<sup>4</sup> but it is not really possible in a magistrates court where magistrates and prosecutors must meet to arrange the court's schedule and to discuss other administrative matters. When they do meet outside the courtroom, however, they must never discuss the merits of any case except in the presence of the accused or his representative.

### **Questioning of witnesses**

There is a fine line between asking necessary questions of witnesses (including the accused when he gives evidence) and “descending into the arena”. Sometimes the judicial officer will need to question witnesses in order to clarify a particular point in the interests of justice, or to assist an unrepresented accused put a question clearly, but generally he should leave the questioning to the parties. Lengthy questioning of a witness is undesirable, particularly if it gives the impression that the judicial officer is favouring one side rather than

---

<sup>1</sup> Lord Hewart in *The King v Sussex Justices* [1924] 1 KB 256 at 259, cited in Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 228.

<sup>2</sup> For a full discussion of the necessary attributes of a judicial officer, see “Attributes, Attitudes and Comportment of Judicial Officers” by Gubbay JA (as he then was) in *Legal Forum* (1988) vol 1 no. 1 p. 3; see also Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–4.

<sup>3</sup> For an example of how a judicial officer should not conduct a trial, see *Jesse v Pratt & Anor* 2001 (1) ZLR 48 (H). That case also illustrates the point that sometimes, where a magistrate has conducted a trial in a biased fashion, the appropriate remedy is not just a setting aside of the proceedings but an order staying any future prosecution.

<sup>4</sup> *R v Maharaj* 1960 (4) SA 256 (N).

the other <sup>5</sup>, and he should avoid intimidating or disconcerting a witness by his questions or influencing the witness's replies.<sup>6</sup>

### **Calling of evidence**

The court has a general power to call witnesses in a criminal case<sup>7</sup> Essentially the court can and should call a witness if it considers that to do so will help it reach a just decision,<sup>8</sup> but this power should be exercised sparingly. It is not the court's function to build up a case which the prosecution has failed to establish or to rebuild the defence case.<sup>9</sup> Only in exceptional circumstances should the court call a witness in a defended case, but if there is a conflict in the evidence which can be resolved by a witness who has not been called, the court should call that witness.<sup>10</sup>

### **Assistance to undefended accused persons**

A judicial officer must assist an unrepresented accused so far as is necessary to ensure that justice is done, because such accused persons are often at a considerable disadvantage vis-à-vis the prosecutor. The judicial officer must not assume the role of defence lawyer or attempt to conduct the defence; he must, however, ensure that points which are pertinent to the defence case are brought out.

As part of this duty, the judicial officer should explain to the accused:

- the charge, so that he understands the case he has to meet;<sup>11</sup>
- the accused's right to legal representation and, where appropriate, to legal aid if substantial injustice would result from the accused not being represented;<sup>12</sup>
- any special onus that is cast on the accused, e.g. any presumptions that he has to rebut;<sup>13</sup>
- any mandatory minimum sentence to which the accused is liable, and (where appropriate) the nature of any special circumstances that may allow the accused to escape the mandatory sentence;<sup>14</sup>
- at the end of the State case, the courses open to the accused and the effect of taking those courses.<sup>15</sup>

Generally, the court should ensure that an undefended accused is informed of his rights and of the options open to him at all stages of the trial:

“The right to a fair trial demands that there should be informed participation by the unrepresented accused. A court is therefore required to explain all procedural rights and options to an

---

<sup>5</sup> *S v Magoge* 1988 (1) ZLR 163 (S).

<sup>6</sup> *S v Mangezi* 1985 (1) ZLR 272 (S).

<sup>7</sup> Section 232 of the Criminal Procedure and Evidence Act.

<sup>8</sup> *R v Green* 1936 SR 181.

<sup>9</sup> *S v Nyamaro & Anor* 1987 (2) ZLR 222 (S) at 229-230.

<sup>10</sup> *S v Buitendag* 1976 (1) RLR 345 (A).

<sup>11</sup> Section 70(1)(b) of the Constitution.

<sup>12</sup> Section 70(1)(d) & (e) of the Constitution. Under section 163A of the Criminal Procedure and Evidence Act, accused persons in the magistrates court must be informed of his right to legal or other representation.

<sup>13</sup> *R v Lebang* 1965 RLR 169 (G).

<sup>14</sup> *S v Chaerera* 1988 (2) ZLR 226 (S) at 229.

<sup>15</sup> *S v M & Ors* 1975 (2) RLR 270 (A).

unrepresented accused — and to do so at every critical stage. The fact that the accused's rights have been explained should be properly recorded.”<sup>16</sup>

The court should allow an undefended accused considerable latitude in cross-examination and should avoid cutting the accused short.

### **Protecting witnesses**

A judicial officer should protect witnesses, including the accused, from offensive or oppressive questioning by legal practitioners on either side, and must stop practitioners if they exceed the bounds of propriety or courtesy.<sup>17</sup>

### **Recusal of judicial officer**

To recuse oneself means to remove oneself as a judicial officer from a particular case because of actual or potential bias, prejudice or conflict of interest.<sup>18</sup>

A judge or magistrate must not sit in a case where he or she may not be able to administer justice impartially, either on the ground of hostility or interest. The principle involved is that no reasonable person should have grounds for suspecting that justice will not be administered in an impartial and unbiased manner.<sup>19</sup> It is an objective test, i.e. whether the judicial officer's conduct leaves a right-thinking observer or litigant with the impression that the accused would not or did not receive a fair trial.<sup>20</sup> The fact that the judicial officer is in fact impartial is not the test: it is the reasonable perception of the parties, or the right-thinking observer, that is important.<sup>21</sup>

The general approach to an application for recusal was laid down by the South African Constitutional Court as follows:

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”<sup>22</sup>

In a later case, the South African Constitutional Court reiterated the following rule of practice which, the court said, had become established for a long time:

“The question which a judicial officer should subjectively ask himself or herself, therefore, is whether, having regard to his or her ... interest in ... proceedings, he or she can bring the necessary judicial dispassion to the issues in the case. If the answer to this question is in the nega-

---

<sup>16</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed page 283.

<sup>17</sup> *S v Jakarasi* 1983 (1) ZLR 218 (S) at 225; *Jesse v Pratt & Anor* 2001 (1) ZLR 48 (H).

<sup>18</sup> Cf the definition in Black's Law Dictionary (4th pocket edition).

<sup>19</sup> *S v Herbst* 1980 (3) SA 1026 (E) at 1029.

<sup>20</sup> *S v Mutizwa* 2006 (1) ZLR 78 (H) at 81.

<sup>21</sup> *S v Malindi* 1990 (1) SA 962 (A) at 969G, cited in *S v Mutizwa* 2006 (1) ZLR 78 (H) at 83-4.

<sup>22</sup> *President of RSA v SA Rugby Football Union* 1999 (4) SA 147 (CC) at 177B-E.

tive, the judicial officer must, of his or her own accord, recuse himself or herself. If, on the other hand, the answer to this question is in the affirmative, the second question to ask is whether there is any basis for a reasonable apprehension of bias on the part of the parties ... If the answer to this question is in the affirmative, the judicial officer must disclose his or her interest in the case, no matter how small or trivial that interest may be. And, in the event of any doubt, a judicial officer should err in favour of disclosure.”<sup>23</sup>

Grounds justifying recusal include the following:

- Where the judicial officer is related to or is friendly with or hostile to the accused or to a principal witness for the prosecution.<sup>24</sup>
- Where the judicial officer has an interest in the outcome of the case. The interest must not be so slight, however, that it would be unreasonable to suppose that it could have any effect on the judicial officer’s mind.
- Where the judicial officer’s personal feelings in regard to the case, or any issue arising in the case, would make it impossible for him or her to act in an impartial manner.
- Generally, where there is a reasonable suspicion of bias.

Examples of cases where a judicial officer should recuse himself or herself are:

- Where the judicial officer, prior to his or her appointment, was a prosecutor concerned with the merits of the case.<sup>25</sup>
- Where the judicial officer has actual knowledge of many of the facts that will be in dispute in the case, e.g. where he or she has tried and sentenced one of two joint accused whose trials have been separated.<sup>26</sup>
- Where the judicial officer knows that the accused has relevant previous convictions — though such knowledge will not invariably disqualify the judicial officer from trying the case.<sup>27</sup>
- Where a magistrate presides over a case in which a fellow-magistrate from the same province is the accused.<sup>28</sup>

An application for recusal may be made by any party to the proceedings, but where possible it should be made at the commencement of the proceedings to avoid the inconvenience of stopping the trial and starting it again *de novo* before another judicial officer. It is improper for a legal practitioner who knows of a ground on which an application for recusal should be made, to refrain from making the application in order to keep it in reserve, as it were, in order to use it as a ground of appeal if the accused is convicted.<sup>29</sup> An application for recusal must be made respectfully and tactfully, and where possible the judicial officer should be approached in chambers (by both parties) and informed of the application and the

---

<sup>23</sup> *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at 111A-C.

<sup>24</sup> Feltoe *Criminal Defenders Handbook* (revised ed 2008) p. 71.

<sup>25</sup> *Levy v Additional Magistrate, Rustenburg* 1925 TPD 316, and *S v Geldenhuys* 1978 (2) PH H127.

<sup>26</sup> *S v Batata* 1965 (1) PH H50 (E).

<sup>27</sup> *Khan v Koch* 1970 (1) RLR 59 (G).

<sup>28</sup> *SA Motor Acceptance Corp v Oberholzer* 1974 (4) SA 808 (T).

<sup>29</sup> *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at 114C. In English law the rule is the same (*Locabail (UK) Ltd v Bayfiled Properties Ltd* [2000] 1 All ER 65 (CA) (cited in *Bernert’s* case) but is based on waiver rather than the interests of justice.

grounds for it before it is made in open court.<sup>30</sup> The applicant must show a reasonable fear, based on objective grounds, that the trial will not be impartial.<sup>31</sup>

While judicial officers must recuse themselves when there are proper grounds for doing so, they must remember that their duty to sit in cases where they are not disqualified from doing so is just as compelling as their duty not to sit when disqualified.<sup>32</sup>

When a judicial officer recuses himself or herself, he or she becomes *functus officio*. If the recusal occurs after the trial has commenced, the trial becomes void. The recusal in itself shows that the court was not competent to hear the case. A new trial may therefore be instituted.<sup>33</sup> Obviously, if the judicial officer recuses himself or herself before the trial has started, the trial will simply proceed before another judicial officer.

A failure by a judicial officer to recuse himself or herself when he or she ought to have done so is a ground for having the proceedings set aside on review.

### **Incapacity of judge or magistrate**

This has been touched on earlier under Pleas. If after the accused has pleaded and evidence has been led, the presiding judicial officer dies or is incapacitated (other than temporarily), the proceedings are regarded as a nullity and the accused may be tried again. It is not permissible for another judicial officer to continue the trial where the former officer left off. If the judicial officer retires or resigns, the proceedings are abortive and lapse without their having to be set aside — though in terms of sec 186(4) of the Constitution a judge who retires may complete proceedings that were begun by him or her.

If a magistrate becomes ill and is unlikely to be able to continue a trial for a considerable period, the proceedings can be set aside on review so that they can be commenced afresh before another magistrate.<sup>34</sup>

---

<sup>30</sup> *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H).

<sup>31</sup> *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H).

<sup>32</sup> *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H).

<sup>33</sup> *Zackey v Magistrate of Benoni* 1957 (3) SA 12 (T); *Magubane v Van der Merwe NO* 1969 (2) SA 417 (N).

<sup>34</sup> *S v Makoni & Ors* 1975 (2) RLR 75 (G).

## 8. PROSECUTORS

### Public prosecutions (“prosecutions at the public instance”)

Almost all prosecutions in Zimbabwe are conducted by officers of the National Prosecuting Authority on behalf of State (i.e. the Government). Such prosecutions are sometimes called “prosecutions at the public instance”. Section 263 envisages an Act of Parliament conferring prosecuting powers on other bodies, but to date no such Act has done so (apart from private prosecutions, which will be dealt with later).

All public prosecutions are instituted in the name of the State<sup>1</sup>

### *The National Prosecuting Authority and the Prosecutor-General*

In terms of section 258 of the Constitution, the National Prosecuting Authority, headed by the Prosecutor-General, is responsible for instituting and undertaking criminal prosecutions on behalf of the State. Prosecutors who make up the staff of the Authority are to be appointed by a board established under the National Prosecuting Authority Act [*Chapter 7:20*]. Professional members of the NPA must be qualified to practise law in Zimbabwe, i.e. they must be registered legal practitioners.<sup>2</sup> The Prosecutor-General is declared by section 260 of the Constitution to be independent and impartial, and his staff must exercise their functions in a non-partisan manner.<sup>3</sup>

The Criminal Procedure and Evidence Act elaborates on the functions of prosecutors. Under the Act, the Prosecutor-General may:

- delegate his functions to any public prosecutor or legal practitioner;<sup>4</sup>
- stop prosecutions (but probably not private prosecutions), in which event the accused person is entitled to an acquittal if he has already pleaded, but not if he has not pleaded;<sup>5</sup>
- take over the prosecution of cases which have been instituted by a private prosecutor;<sup>6</sup>
- issue a warrant ordering the liberation from custody of a person whom he has decided not to prosecute.<sup>7</sup>

The Prosecutor-General has power to direct the Commissioner-General of Police to investigate crimes,<sup>8</sup> but neither he nor his staff plays any direct part in such investigations.

The Prosecutor-General is appointed by the President on the advice of the Judicial Service Commission, following the procedure for the appointment of a judge (i.e. public interviews to select suitable candidates).<sup>9</sup> His security of tenure is the same as that of a judge — i.e.

---

<sup>1</sup> Section 5 of the Criminal Procedure and Evidence Act.

<sup>2</sup> Section 9 of the National Prosecuting Authority Act.

<sup>3</sup> Section 261 of the Constitution.

<sup>4</sup> Section 5 of the Criminal Procedure and Evidence Act.

<sup>5</sup> Section 8 of the Criminal Procedure and Evidence Act.

<sup>6</sup> Section 20 of the Criminal Procedure and Evidence Act.

<sup>7</sup> Section 10 of the Criminal Procedure and Evidence Act.

<sup>8</sup> Section 259(11) of the Constitution.

<sup>9</sup> Section 259(3) of the Constitution.

he cannot be removed from office except for misconduct and after a tribunal has recommended his removal.<sup>10</sup>

In the exercise of his prosecutorial functions, he is not subject to the direction or control of anyone.<sup>11</sup> Hence a court will not normally comment on the exercise of the Prosecutor-General's discretion to prosecute a case, and has no power to interdict (i.e. prevent) the Prosecutor-General from doing so or, by order, compel him to do so.<sup>12</sup> On the other hand, there is South African authority to the effect that a court can intervene when the Prosecutor-General's discretion is improperly exercised, and the same would probably apply in Zimbabwe.<sup>13</sup>

### **Other law officers**

The National Prosecuting Authority Act [*Chapter 7:20*] provides for the appointment of a National Director of Public Prosecutions and other professional staff of the National Prosecuting Authority, who must possess legal qualifications entitling them to practise in all courts in Zimbabwe.<sup>14</sup> The Prosecutor-General can delegate his or her functions to the National Director of Public Prosecutions and other professional staff members of the Authority.<sup>15</sup>

In magistrates courts, prosecutions are conducted by public prosecutors as representatives of the Prosecutor-General.<sup>16</sup> They are appointed by the Prosecutor-General in writing, and this letter of appointment gives them their authority to prosecute, usually within a particular magisterial province or regional division. Police officers have been appointed to conduct prosecutions, particularly in smaller centres. This practice is unconstitutional.<sup>17</sup>

### **Independence of prosecutors**

According to sections 260 and 261 of the Constitution, the Prosecutor-General is independent and he and all the other officers of the National Prosecuting Authority must exercise their functions impartially and without political bias.

Is this a good idea? In some countries such as Italy and Ireland, prosecutors are completely independent. In Zimbabwe, before the new constitution came into operation, the Attorney-General (who was responsible for prosecutions) was not insulated from political pressure since he was a member of Cabinet and Parliament.

To some extent this was justifiable, since a prosecutor occasionally has to take the public interest into account in deciding whether or not to prosecute a case, but there is a growing international consensus that in a democracy the decision whether or not to prosecute should

---

<sup>10</sup> Section 259(7) of the Constitution.

<sup>11</sup> Section 260(1) of the Constitution.

<sup>12</sup> *Allen v Attorney-General* 1936 CPD 302 and *Gillingham v Attorney-General* 1909 TS 572, cited in Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 62.

<sup>13</sup> *Highstead Entertainments (Pty) Ltd v Minister of Law and Order & Ors* 1994 (1) SA 387 (C) and *Ncube & Ors v Attorney-General* 2002 (2) ZLR 130 (H). Note, however, that the South African constitution does not have a provision directly equivalent to section 260(1) of our Constitution.

<sup>14</sup> Sections 8 and 9 of the Act.

<sup>15</sup> Section 12 of the National Prosecuting Authority Act [*Chapter 7:20*] and section 5 of the Criminal Procedure and Evidence Act.

<sup>16</sup> Section 11 of the Criminal Procedure and Evidence Act.

<sup>17</sup> *Zimbabwe Law Officers Association & Anor v National Prosecuting Authority & Ors* CCZ 1-2019. The Court gave the NPA two years in which to "disengage" all police officers currently serving as prosecutors.

not be influenced by partisan political considerations or even suspected of being so influenced. This is because instituting a prosecution adversely affects the accused person's dignity, status and reputation, and if the decision to prosecute is influenced by the dominant political party prosecutions may be used to discredit political opponents. Even the perception that the decision to prosecute may be influenced by political considerations is enough to discredit the prosecution process and hence to undermine public confidence in the law.

In some cases, for example where public security is involved or where public policy must be taken into account, the decision to prosecute may legitimately be influenced by political considerations, but if the rule of law is to be observed these considerations should be set out in written guidelines for prosecutors and the final decision whether or not to prosecute must be left to the independent judgement of the prosecutor.

Hence, in terms of section 260(2) of the Constitution and section 11A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the Prosecutor-General must formulate and publish the general principles by which he decides whether and how to institute and conduct criminal proceedings. The Prosecutor-General has published these principles<sup>18</sup>, and we shall consider them shortly when we deal with the decision to prosecute.

### ***Duties of prosecutors***

All prosecutors, whether legal practitioners or not, must dedicate themselves to the achievement of justice, and must pursue that aim impartially. They must conduct the case against the accused person with candour and absolute fairness. They have a special duty to ensure that the truth emerges in the court, and must produce all relevant evidence and ensure, as best they can, the truth of that evidence. If they know of a point in favour of the accused person, they must bring it out, and if they know of a credible witness who can speak of facts which go to show the innocence of the accused, they must themselves call that witness if the accused is unrepresented, and if the accused is represented, they must tender the witness to the defence.<sup>19</sup> If a State witness departs from his statement, the prosecutor must draw the court's attention to the discrepancy or reveal the contradiction to the defending practitioner.<sup>20</sup>

### **Disclosure of discrepancies in witnesses' testimony**

A prosecutor has a duty to disclose material inconsistencies between what a State witness has said in court and what he told the police in his statement.<sup>21</sup> If the accused is legally represented, the disclosure should be made to the defence counsel by making the statement available to him; if not, the court should be informed about the discrepancy. Minor discrepancies need not be disclosed, however, but if in doubt as to whether a discrepancy is material or minor the prosecutor should disclose it.<sup>22</sup>

Another way to deal with discrepancies is by impeaching the witness's credibility. This involves confronting the witness with his previous statement. The procedure for doing this will be set out later in these notes.

---

<sup>18</sup> They are published in General Notice 247 of 2015.

<sup>19</sup> *S v Van Rensburg* 1963 (2) SA 343 (N).

<sup>20</sup> This paragraph is a summary of a passage from *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S) at 549C-G. See also *Jesse v Pratt & Anor* 2001 (1) ZLR 48 (H) for an illustration of how a prosecutor should not conduct himself.

<sup>21</sup> *S v Mutsinziri* 1997 (1) ZLR 6 (H) and the cases there cited.

<sup>22</sup> *S v Mutsinziri supra*

## **The decision to prosecute**

The Prosecutor-General has a discretion whether or not to prosecute and, as already mentioned, in the exercise of that discretion he is not subject to interference from any other person or authority though he is obliged to publish the principles on which he bases that discretion.<sup>23</sup> But if he exercises his discretion *mala fide* or for an ulterior or improper motive, or if he has not applied his mind to the matter or has disregarded the provisions of a statute, in such a case his decision may be subject to review.<sup>24</sup>

In most cases, the decision whether or not to prosecute is taken by a public prosecutor on behalf of the Prosecutor-General; and many cases are simply dropped by the police before the accused is brought to court. But sensitive cases should be referred to the Prosecutor-General for his decision.

In deciding whether or not to prosecute a particular case, the Prosecutor-General (or, where the decision is taken by a public prosecutor, the public prosecutor) should take the following considerations into account:<sup>25</sup>

- Prosecution is a way of enforcing the law, and if the law is not enforced it will fall into disrepute. So generally speaking, if someone commits a crime he should be prosecuted for it. This is a requirement of the rule of law, one of whose basic tenets is that in a democratic State laws should be enforced and make no distinction between classes and rank. Those who break the law should not be allowed to do so with impunity.
- Sufficiency of evidence: at the very least, a *prima facie* case (i.e. one in which, according to the available evidence, the accused is apparently guilty of the crime charged) should exist before it would be justifiable to prosecute the accused. The prosecutor should ask if there is reasonable and probable cause for prosecution.<sup>26</sup> The meaning of “reasonable and probable cause” has been explained as follows:

“... an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”<sup>27</sup>
- Whether the accused is able to rely on a special defence, for example a pardon, or diplomatic immunity, or parliamentary immunity, or prescription of the crime (for all crimes except murder the right to prosecute lapses after 20 years). Accomplices who have given satisfactory evidence for the State are not liable to be prosecuted for the crime about which they have given evidence.<sup>28</sup>

---

<sup>23</sup> Section 260(1) & (2) of the Constitution. These principles have now been published in General Notice 247 of 2015.

<sup>24</sup> *Highstead Entertainment (Pty) Ltd v Minister of Law & Order* 1994 (1) SA 387 (C) and *Ncube & Ors v Attorney-General* 2002 (2) ZLR 130 (H); *contra*, see *Central African Examiner (Pvt) Ltd v Howman & Ors NNO* 1966 RLR 75 (G) at 81-2 and *S v Hamadziripi* 1989 (2) ZLR 38 (H).

<sup>25</sup> These considerations are a summary of those listed by Reid Rowland *Criminal Procedure in Zimbabwe* pp. 3-11-12.

<sup>26</sup> In *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A), it was held that a prosecutor would have no reasonable cause for prosecuting (and so would be liable to an action for malicious prosecution) if he did not have such information as would lead a reasonable person to conclude that the accused had probably been guilty of the crime charged.

<sup>27</sup> *Hicks v Faulkner* (1878) 8 QBD 167 at 171, cited in *Bande v Muchinguri* 1999 (1) ZLR 476 (H) at 485C.

<sup>28</sup> Section 267 of the Criminal Procedure and Evidence Act. The section is dealt with in more detail later under Pleas.

- The triviality of the crime. Even where the maxim *de minimis non curat lex* does not apply, the triviality of the crime may make a prosecution pointless. And where the consequences of a prosecution to the accused would be out of all proportion to the gravity of the crime, it is proper to decline to prosecute.
- The age of the accused person. If he is very old and infirm, little may be achieved by prosecuting him; if, on the other hand, he is a juvenile it may be better to deal with him in other ways.
- Mental illness or stress. If there is medical evidence that the accused is suffering from a mental condition that would be seriously worsened by the strain of prosecution, it may be a reason for declining to prosecute.
- The attitude of the complainant. This is important, though not decisive, since the decision to proceed with a criminal case vests in the police and the Prosecutor-General, not the complainant. If the complainant does not wish to proceed with the case, the Prosecutor-General should pay due regard to his or her views, since the relationship between the complainant and the accused may be such that prosecution would do more harm than good.
- The fact that the accused has already been sufficiently punished. For example, it would offend many people's sensibilities if a person who had been badly injured in a traffic accident caused by his negligence were to be prosecuted, where no one else was injured.
- The need to use the accused as a witness against someone else.
- Whether any useful purpose will be served by prosecuting the accused. If prosecution will serve no useful purpose then the Prosecutor-General should decline.<sup>29</sup>
- Finally, the public interest should be considered in appropriate cases.<sup>30</sup>

In deciding whether or not to prosecute, the police and prosecuting authorities should not knowingly allow a pattern of contravention of a particular statute to develop and then, unexpectedly, arrest and prosecute. This offends the principle of legality and is unfair. Secondly, they should not adopt a discriminatory approach and prosecute selectively, distinguishing unjustifiably between persons in similar circumstances.<sup>31</sup>

If a prosecutor doubts the strength of the State case, he should not invite the accused to pay a deposit fine in the hope that the accused may pay the fine and relieve the State of the burden of proving its case.<sup>32</sup>

If a decision is made not to prosecute a case, the charge should be withdrawn against the accused as soon as possible, and if the accused is in custody he must be released "forthwith".<sup>33</sup> If the charge is withdrawn before the accused has pleaded, it is possible to bring it again; that is to say, the accused can be charged again with the same crime arising from the same facts.<sup>34</sup>

---

<sup>29</sup> *S v Hamadziripi* 1989 (2) ZLR 38 (H).

<sup>30</sup> See the address given by Prof Jeffrey Jowell Q.C. to students at the University of Cape Town, 2010.

<sup>31</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 54. See also *S v Humbarume & Anor* 2001 (2) ZLR 234 (H) at 238C.

<sup>32</sup> *S v Eusuf* 1949 (1) SA 656 (N).

<sup>33</sup> Section 321 of the Criminal Procedure and Evidence Act.

<sup>34</sup> Section 320(3) of the Criminal Procedure and Evidence Act.

## Private prosecutions

Almost all prosecutions in Zimbabwe are brought by the State, but private persons are allowed to prosecute crimes in limited circumstances. This provides a “safety valve” in the machinery of the law, and is an indirect method of controlling corruption or incompetence in the State’s prosecution services.<sup>35</sup> Can companies and other corporate bodies bring private prosecutions? The Supreme Court has held that a company can do so,<sup>36</sup> but section 16(2)(a)(iii) of the Criminal Procedure and Evidence Act, as amended in 2016, suggests that only individuals, i.e. human beings, can do so.<sup>37</sup>

### **Who may prosecute**

In order to bring a prosecution, a private person must show:<sup>38</sup>

- some substantial and peculiar interest (i.e. an interest greater than that of any other member of the public)<sup>39</sup>
- in the issue of the trial (i.e. in the conviction or acquittal of the alleged offender)
- arising out of some injury (which must be an actual, not an anticipated, injury but need not be of a patrimonial nature. It must be an injury that would be civilly actionable.)<sup>40</sup>
- which he or she individually has suffered.
- in consequence of the commission of the crime. (there must be a causal connection between the injury suffered and the commission of the crime).<sup>41</sup>

The onus is on the private prosecutor to show compliance with these requirements.

Other persons may also bring private prosecutions:<sup>42</sup>

- husbands and wives may bring prosecutions for crimes committed against their spouses;
- guardians or curators of minors or mentally disordered or defective persons may bring prosecutions for crimes against their wards;
- the surviving spouse or child or, failing them, the next of kin, of a deceased person may bring a prosecution for a crime by which the person’s death was caused.

### **Procedure for instituting private prosecution**

Before instituting a private prosecution, the prosecutor must obtain a certificate from the Prosecutor-General stating that he declines to prosecute at the public instance.<sup>43</sup> This cer-

---

<sup>35</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 57. For an outline of the history and purpose of private prosecutions, see *Black v Barclays Zimbabwe Nominees(Pvt) Ltd* 1990 (1) SACR 433 (W).

<sup>36</sup> *Telecel (Zimbabwe) (Pvt) Ltd v Attorney-General S-1-2014*, disapproving the South African case of *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A).

<sup>37</sup> The provision is mentioned below; it states that the Prosecutor-General may issue a certificate of *nolle prosequi* only if he is satisfied that the party who intends to institute a private prosecution “will conduct the private prosecution as an individual (whether personally or through his or her legal practitioner) ...”

<sup>38</sup> Section 13 of the Criminal Procedure and Evidence Act.

<sup>39</sup> *Attorney-General v Van der Merwe & Bornman* 1946 OPD 197.

<sup>40</sup> See Lansdown & Campbell *S.A. Criminal Law & Procedure* vol 5 p. 122; *Ellis v Visser* 1954 (2) SA 431 (T) and *Levy v Benatar* 1987 (1) ZLR 120 (S). For a contrary view, see *Phillips v Botha* 1995 (3) SA 948 (W), where the court held that fraudulently stopping cheques given in payment of a gambling debt (which was not civilly enforceable) could be the subject of a private prosecution brought by the injured party.

<sup>41</sup> *Phillips v Botha* 1995 (3) SA 948 (W)

<sup>42</sup> Section 14 of the Criminal Procedure and Evidence Act.

tificate is called a *nolle prosequi* (“to decline to prosecute”). If the Prosecutor-General declines to prosecute a case, he must issue a certificate to a person who wishes to institute a private prosecution if the person produces a sworn statement from which it appears to the Prosecutor-General that:

- the person is the victim of the alleged crime, or otherwise has personally suffered, as a direct consequence of the crime, an invasion of a legal right beyond that suffered by the public generally [this is essentially the same as saying the person must have “a substantial and peculiar interest” in the outcome of the case], and
- the person has the means to conduct the private prosecution promptly and timeously, and
- the person will conduct it as an individual or as representative of a class in terms of the Class Actions Act [*Chapter 8:17*]. What this seems to mean is that bodies corporate cannot be granted a certificate *nolle prosequi*.<sup>44</sup>

The Prosecutor-General can refuse to grant a certificate on the following grounds:<sup>45</sup>

- that the conduct complained of does not constitute a crime, or
- that there is no possibility, or only a remote one, of proving the charge against the accused, or
- whether the accused has adequate means to conduct a defence to the charge, where the person would have qualified for legal aid if he had been prosecuted by the State, or<sup>46</sup>
- that it is not in the interests of national security or the public interest to grant the certificate.

These appear to be the only grounds on which the Prosecutor-General can refuse to issue a certificate of *nolle prosequi*. The last ground – national security and public interest – is excessively wide.

If the accused person is already in prison or on bail, and a warrant for his liberation has been issued by the Prosecutor-General under section 10 of the Criminal Procedure and Evidence Act, the private prosecutor can apply to the High Court or a judge for a warrant for the accused’s further detention. In such an event, a *nolle prosequi* is not required, because the Prosecutor-General has already signified his intention not to proceed with the prosecution.

Normally, however, the accused would be brought to court by the issue of a summons, and before a summons can be issued the private prosecutor must produce a *nolle prosequi*.<sup>47</sup>

A court may order a private prosecutor to give security for the accused person’s costs in the event of an acquittal, and in that event no further steps can be taken in the prosecution until the security has been given.<sup>48</sup>

---

<sup>43</sup> Section 16 of the Criminal Procedure and Evidence Act.

<sup>44</sup> Section 16(2) of the Criminal Procedure and Evidence Act. This is contrary to the *Telecel* case mentioned in footnote 36 and may well be unconstitutional in that it denies corporate bodies the right of access to courts.

<sup>45</sup> Section 16(3) of the Criminal Procedure and Evidence Act.

<sup>46</sup> It is not clear what this provision (section 16(3)(c) of the Criminal Procedure and Evidence Act) is supposed to mean. The accused’s ability to conduct a defence is not considered by the Prosecutor-General when deciding whether or not to prosecute him at the public instance, so why should it be relevant in a private prosecution?

<sup>47</sup> Section 16 of the Criminal Procedure and Evidence Act.

<sup>48</sup> Section 17 of the Criminal Procedure and Evidence Act.

If the private prosecutor does not appear on the day set down for the accused's trial, the court will dismiss the charge against the accused and proceedings may not be re-instituted by any private party. But if the court has reason to believe that the private prosecutor's absence was due to circumstances beyond his control, it may adjourn the case.<sup>49</sup>

The Prosecutor-General or a public prosecutor may intervene in a private prosecution by taking over the case at any stage of the proceedings. This is done by applying to the court for an order to stop all further proceedings in the private prosecution; the court must grant such an order.<sup>50</sup>

The procedure at the trial of a private prosecution is the same as in a criminal trial at the public instance, except that the indictment is in the name of the private prosecutor.

If the accused person is acquitted, the court may order the private prosecutor to pay the whole or part of his expenses, and may award costs against the private prosecutor if it considers the charge or complaint to have been unfounded and vexatious.<sup>51</sup> On the other hand, if the accused is convicted, the court may order him or the State to pay the prosecutor's costs and expenses.<sup>52</sup>

---

<sup>49</sup> Section 18 of the Criminal Procedure and Evidence Act.

<sup>50</sup> Section 20 of the Criminal Procedure and Evidence Act; *Central African Examiner (Pvt) Ltd v Howman & Ors* NNO 1966 RLR 75 (G) at 82G-I.

<sup>51</sup> Section 22 of the Criminal Procedure and Evidence Act.

<sup>52</sup> Section 22 of the Criminal Procedure and Evidence Act.

## 9. PROSECUTION OF COMPANIES AND ASSOCIATIONS

### Criminal liability of corporate bodies and associations

Companies and other corporate bodies (e.g. parastatals) have legal personality separate from that of their members, but they cannot act except through the agency of their directors and employees. Partnerships and associations, similarly, can act only through their members. If a director, employee or member acts unlawfully then the company, corporate body or association on whose behalf the act was done may become criminally liable for the act. This liability can arise in the following ways:

- In the case of a company or other corporate body, through vicarious liability or, more broadly, through section 277 of the Criminal Law Code, which imposes liability on a corporate body for any act performed:
  - by a director or employee of the corporate body; or
  - by anyone on the instructions of a director or employee of the corporate body; or
  - by anyone with express or implied permission given by a director or employee of the corporate body.

But liability will attach only where the director, employee or authorised person<sup>1</sup> was acting in the exercise of his powers or duties as such, or was furthering or trying to further the interests of the corporate body.

- In the case of an unincorporated association, through section 277(4) of the Criminal Law Code, which imposes liability on a member of the association (or, where there is a managing committee, on a member of the committee) for criminal acts committed by other members, where the member was acting in the exercise of their powers or duties as such, or was furthering or trying to further the interests of the association. The member can however escape liability if he or she can show that he or she did not take part in the commission of the crime.

Conversely, directors or employees of a corporate body are personally liable for the crimes of the corporate body (i.e. they can be charged personally for the crimes) unless they can show on a balance of probabilities that they did not take part in the commission of the crimes (sec 277(3) of the Criminal Law Code). It is very doubtful if sec 277(3) is constitutional even though it should probably be construed so as to impose liability on only those directors and employees who form part of the “directing mind” of the corporate body.<sup>2</sup> In *S v Coetzee & Ors* 1997 (3) SA 527 (CC), the South African Constitutional Court struck down the SA equivalent of sec 277(3) of the Criminal Law Code, on the ground that by making directors liable for their companies’ crimes it laid an unconstitutional onus on them to prove that they took no part in the crime. Our Constitutional Court might well come to the same conclusion.

---

<sup>1</sup> i.e. a person who was acting on the instructions or with the express or implied permission of a director or employee of the corporate body.

<sup>2</sup> *Tesco Supermarkets Ltd v Natrass* [1971] 2 All ER 127 (HL). In the case of a company, the “directing mind” would be the board of directors.

Note that the word “director” is given an extended meaning by section 277: it means anyone who governs or controls the corporate body, whether lawfully or otherwise, or who is a member of a committee that governs or controls it, whether lawfully or otherwise.

## **Charging corporate bodies and associations**

Where a company or other corporate body is charged with a crime, a director or employee must be cited as representative of the corporate body. If he is individually liable for the crime, then he will be cited in his personal capacity as well. A director or employee who is cited in his representative capacity may not be committed to prison pending trial, nor may he be punished personally for the crime (and, of course, the corporate body cannot be sentenced to imprisonment if it is convicted of the crime).<sup>3</sup>

In the case of an association, the charge will aver the commission of the crime by one member and the vicarious liability of any other member who is being charged.

## **Evidence and presumptions**

### ***Proof of a body’s corporate nature***

In the case of a company, proof of incorporation is provided by a certified copy of the company’s certificate of incorporation issued by the Registrar of Companies. This may be handed in by the prosecutor.

Proof of the corporate status of a statutory body, including a local authority, is provided by reference to the statute under which the body is incorporated (though such proof would seldom if ever be needed because courts can take judicial notice of statutes<sup>4</sup>).

Evidence of the constitution of any other body would be needed to prove its corporate status.

### ***Presumptions***

Documents and records that were made or kept by a director, employee or agent of a corporate body, or that were in the custody or under the control of a director, employee or agent, are admissible in evidence against the corporate body. And if a record or document is proved to have been at any time in the custody or under the control of a director, employee or agent then it is presumed to have been made or kept by him within the scope of his activities as a director, employee or agent.<sup>5</sup>

Similar provisions exist for unincorporated associations: records kept by a member of such an association within the scope of his duties as such, and documents that were at any time in the custody or under the control of a member, are admissible in evidence against the accused member, and those records and documents are presumed to have been made or kept within the scope of the member’s activities.<sup>6</sup>

As already indicated, section 277(3) of the Criminal Law Code states that where a corporate body is liable for prosecution for a crime for any conduct, “that conduct shall be deemed to

---

<sup>3</sup> Section 385(3), provisos (iii) and (iv), of the Criminal Procedure and Evidence Act. A director or employee may be punished for failing to appear in court to answer the charge, even if he is cited only in his representative capacity, because he is being punished for his own default.

<sup>4</sup> Section 32(1) of the Interpretation Act [*Chapter 1:01*].

<sup>5</sup> Section 385(4) and (5) of the Criminal Procedure and Evidence Act.

<sup>6</sup> Section 385(9) & (10) of the Criminal Procedure and Evidence Act.

have been the conduct of every person who at the time was a director or employee of the corporate body” unless it is proved that he took no part in the conduct.

And section 277(4) of the Criminal Law Code has a similar deeming provision in regard to members of unincorporated associations.

## 10. MENTALLY DISORDERED ACCUSED PERSONS

### Introduction<sup>1</sup>

Accused persons who are found to be mentally disordered or intellectually handicapped, either when they committed the alleged crime or when they are to stand trial for a crime, cannot be treated in the same way as persons who are sane, and generally speaking they have to be dealt with under the Mental Health Act [*Chapter 15:12*].<sup>2</sup>

There are five situations in which the problem of dealing with mentally disordered or intellectually handicapped persons may be encountered:

1. a person who appears to be mentally disordered is arrested by the police;
2. an accused person is awaiting trial and it appears to the authorities that he or she may be mentally disordered or intellectually handicapped;
3. after a trial has begun, it appears to the court that the accused person is or may be mentally disordered or intellectually handicapped;
4. after an accused person has been convicted, it appears that the accused person may be mentally disordered or intellectually handicapped;
5. evidence led at the trial shows that the accused person was mentally disordered or intellectually handicapped at the time the crime was committed, though he is now sane.

Dealing with each in turn:

### **Police powers on arrest of mentally disordered or intellectually handicapped person**

If a person who appears to be mentally disordered or intellectually handicapped is arrested for a petty crime such as shouting or screaming in a public place, a police officer can apply to a magistrate for a reception order under section 4 of the Mental Health Act [*Chapter 15:12*]. The application must be accompanied by an affidavit in which the applicant states that he or she believes the person concerned to be mentally disordered and the grounds for that belief. A reception order is an order issued by a magistrate or a judge (usually a magistrate) and directing that the person in respect of whom it is issued should be removed to and detained in an institution. On receipt of the application the magistrate must get the person examined by two medical practitioners, one of whom should be a government medical practitioner,<sup>3</sup> and if the magistrate is satisfied from the certificates of the practitioners that the person is mentally disordered or intellectually handicapped and a danger to himself or others,<sup>4</sup> the magistrate may issue a reception order committing the person to an institution. Once a reception order is issued, the person is detained in the institution for up to six weeks where he or she is examined and treated under the Mental Health Act [*Chapter 15:12*].<sup>5</sup>

---

<sup>1</sup> What follows is based on Reid Rowland, *Criminal Procedure in Zimbabwe*, Chapter 12.

<sup>2</sup> Section 192 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>3</sup> Section 5 of the Mental Health Act [*Chapter 15:12*].

<sup>4</sup> That is the usual ground; there are others set out in section 8 of the Mental Health Act, such as that the person is addicted to drugs or alcohol, or is a psychopath, or is of no fixed abode.

<sup>5</sup> Section 9 of the Act.

Alternatively, a police officer may make what is called an urgency application under section 11 of the Mental Health Act [*Chapter 15:12*]. Under this procedure, the police officer obtains a certificate from a medical practitioner or a psychiatric nurse practitioner indicating that the person is mentally disordered or intellectually handicapped and, on the basis of that certificate and an affidavit from the applicant, the person is received into a “suitable place” (usually a hospital or similar institution). The person in charge of the “suitable place” must notify a magistrate within 24 hours of the person’s admission, and thereafter the magistrate must proceed in the same way as if an application had been made for a reception order.<sup>6</sup>

This procedure is particularly suitable for keeping mentally disordered people who commit petty crimes out of the criminal courts. They can be given treatment rather than punishment.

### **Mental illness disclosed before trial**

If it appears to the Prosecutor-General, a public prosecutor or a person in charge of a prison or a police lock-up that a person who is being detained there pending trial is mentally disordered or intellectually handicapped, he or she must report it to a magistrate of the province where the person is being detained.<sup>7</sup> If the trial has already begun, the report must be made to the judge or magistrate presiding at the trial. There is no reason why such a report should not be made by a defence lawyer, if he or she considers his or her detained client is mentally disordered or intellectually handicapped.

A magistrate to whom such a report is made must, within 24 hours, direct two medical practitioners (or one medical practitioner and a psychiatric nurse) to examine the accused person and certify his or her mental state.<sup>8</sup> In practice, the magistrate will ask the superintendent of the prison where the person is detained to arrange for such examination. If the accused person is on remand, the case will have to be remanded for long enough to allow the examination to take place — but not for longer than two weeks at a time.

The magistrate will consider the medical certificates when they have been prepared and, if he or she is satisfied that the accused person is mentally disordered or intellectually handicapped and would not be able to understand the nature of any criminal proceedings or to conduct his defence properly, he must order the accused person to be detained in an institution (or in a special institution if the medical practitioners have certified that the accused is a danger to others).<sup>9</sup> If the accused person was being detained for a petty crime (i.e. if the magistrate considers that he would not receive a sentence of imprisonment or a fine of more than level 3) the magistrate must stay the criminal proceedings and either order the accused person to submit himself to medical treatment or order the accused’s guardian or close relative to apply for the accused to be received into an institution for treatment as a civil patient.<sup>10</sup>

The concern at this stage is whether the accused person is so mentally disordered or intellectually handicapped as to be unable to understand the nature of any criminal proceedings or to conduct his defence. Note that amnesia in respect of the facts and circumstances of

---

<sup>6</sup> Section 11(5) of the Mental Health Act [*Chapter 15:12*].

<sup>7</sup> Section 27 of the Mental Health Act [*Chapter 15:12*].

<sup>8</sup> Section 27 of the Mental Health Act [*Chapter 15:12*].

<sup>9</sup> Section 27 of the Mental Health Act [*Chapter 15:12*].

<sup>10</sup> Section 27(3)(a)(iii) of the Mental Health Act [*Chapter 15:12*].

the crime with which the accused is charged does not in itself render him unfit to stand trial.<sup>11</sup>

## **Mental illness disclosed during trial**

### **1. Mental disorder rendering accused unfit to stand trial**

If, after a trial has commenced, the accused person appears to the presiding judge or magistrate to be mentally disordered or intellectually handicapped or if the judge or magistrate receives a report to that effect from the prosecutor or the person in charge of the place where the accused is detained, the judge or magistrate may adjourn the proceedings for up to 14 days and remand the accused person in custody so that his mental condition may be investigated.<sup>12</sup> The judge or magistrate will direct two medical practitioners (or, if two are not available, one medical practitioner and one psychiatric nurse) to examine the accused and prepare certificates as to his mental state.

If, after considering the medical certificates and hearing any other evidence he or she considers necessary, including oral evidence from the medical personnel, the judge or magistrate considers the accused person to be so mentally disordered or intellectually handicapped as to be unable to understand the nature of the proceedings or to conduct his defence properly, he or she must record that fact, and then must do one or other of the following:

- issue an order directing that the accused be removed to an institution and detained there;
- if the judge or magistrate considers that the accused would be a danger to others and a medical certificate by a designated medical practitioner<sup>13</sup> so recommends, order the accused to be detained in a special institution;
- If the judge or magistrate considers that the crime for which the accused person is being charged will not result in imprisonment without the option of a fine or a fine of more than level 3, order the proceedings to be stayed and either order the accused person to submit himself to medical treatment or order the accused's guardian or close relative to apply for the accused to be received into an institution for treatment as a civil patient.<sup>14</sup>

Where a magistrate orders the detention of the accused, the order has the effect of a reception order and is subject to confirmation by a judge.<sup>15</sup>

If after considering the medical reports and other evidence the judge or magistrate is not able to come to a conclusion about the accused person's mental state, he or she may order that the accused be removed to an institution for further examination, but in that event the accused may not be detained for more than eight weeks. Alternatively he or she may order the accused person's release for the purpose of further examination.<sup>16</sup>

---

<sup>11</sup> *R v Njiri* 1959 (2) R & N 241 (SR). Amnesia must, however, be taken into account by the trial court since it may disadvantage the accused through depriving him of a possible defence (*Ibid*).

<sup>12</sup> Section 28 of the Mental Health Act [*Chapter 15:12*].

<sup>13</sup> That is, a practitioner whose name appears on a list of specialised practitioners prepared by the Secretary for Health in terms of section 108 of the Mental Health Act [*Chapter 15:12*].

<sup>14</sup> Section 28 of the Mental Health Act [*Chapter 15:12*].

<sup>15</sup> Section 28(5) as read with section 18 of the Mental Health Act [*Chapter 15:12*].

<sup>16</sup> Section 28(9) of the Mental Health Act [*Chapter 15:12*].

If the judge or magistrate finds that the accused person is mentally disordered or intellectually handicapped, the trial is held in abeyance until the accused recovers and he cannot demand that he be either acquitted or convicted.<sup>17</sup>

## **2. Mental disorder not rendering accused unfit to stand trial**

If medical evidence adduced in the circumstances outlined above shows that the accused person, though mentally disordered or intellectually handicapped, is able to understand the nature of the criminal proceedings and to conduct his defence properly, the trial will normally proceed. However, if the medical evidence from two medical practitioners, one of whom is a designated practitioner, indicates that the accused is a danger to others, then special procedures must be followed after the verdict in the trial.

- If the accused is acquitted or discharged, the court may immediately thereafter order that he be returned to prison and subsequently detained in a special institution.<sup>18</sup> If a magistrate makes such an order, the accused cannot be detained for longer than eight weeks, and the papers are sent to the Registrar of the High Court, via the Prosecutor-General, for consideration of a judge who can order the accused's continued detention in the institution for an indefinite period.
- If the accused is convicted, the court may impose sentence in the ordinary way and, in addition, order that the accused should be returned to prison and subsequently detained in a special institution.<sup>19</sup> If the sentence is one of imprisonment it will be served in the special institution. A magistrate's order that the accused should be detained in a special institution is subject to review by a judge of the High Court<sup>20</sup>, and such an order, whether made by a magistrate or a judge, counts as a conviction for the purposes of an appeal.<sup>21</sup>

## **Recovery of person found unfit to plead or stand trial**

Upon the recovery of a person who is in an institution after an order under section 27 or 28 of the Mental Health Act [*Chapter 15:12*] (i.e. a person who has been detained in the institution after being found before or during trial to be mentally disordered), he or she must not be released unless the Prosecutor-General has been given at least 14 days' notice of the proposed release.<sup>22</sup> The Prosecutor-General will then decide whether or not to revive the prosecution.

## **Mental illness becoming apparent after conviction**

Where it becomes apparent after conviction in a magistrates court that the accused was mentally disordered or intellectually handicapped, the High Court should set aside the verdict on review and have the convicted person examined in terms of section 28 of the Mental Health Act [*Chapter 15:12*]. After that, the magistrate would be free to deal with him under section 28 of the Act (i.e. following the procedure as if the person had been found men-

---

<sup>17</sup> Section 28(11) of the Mental Health Act [*Chapter 15:12*].

<sup>18</sup> Section 38(2)(a) of the Mental Health Act [*Chapter 15:12*].

<sup>19</sup> Section 38(2)(b) of the Mental Health Act [*Chapter 15:12*].

<sup>20</sup> Section 38(7) of the Mental Health Act [*Chapter 15:12*].

<sup>21</sup> Section 38(8) of the Mental Health Act [*Chapter 15:12*].

<sup>22</sup> Section 31 of the Mental Health Act [*Chapter 15:12*].

tally disordered during the trial) or, if the person can understand the nature of the criminal proceedings, to proceed with the trial.<sup>23</sup>

If a convicted person appears to an officer in charge of the prison to be mentally disordered, the officer must report it to the nearest magistrate, who must direct that the convicted person be medically examined. If the medical evidence shows that the person is mentally disordered or intellectually handicapped, the magistrate must order his removal to an institution or special institution (depending on the medical evidence).<sup>24</sup>

### **Accused person who was mentally disordered when the crime was committed**

The courts most frequently deal with mental disorder in cases where the accused person, though sane when the trial takes place, was mentally disordered or intellectually handicapped when the crime was committed.

If, having heard evidence, including medical evidence, a judge or magistrate finds that the accused “did the act constituting the offence charged ... but that when he did the act<sup>25</sup> he was mentally disordered or intellectually handicapped so as to have a complete defence in terms of section 248<sup>26</sup> of the Criminal Law Code”, the court must return a special verdict to the effect that the accused is not guilty because of insanity. The court must then make one of the following orders:

- that the accused be returned to prison for transfer to a mental institution for examination;
- if the court considers that the accused is charged with a petty crime (i.e. that he would not have been sentenced to imprisonment without the option of a fine or to a fine of more than level 3), either order the accused person to submit himself to medical treatment or order the accused’s guardian or close relative to apply for the accused to be received into an institution for treatment as a civil patient;
- if the court is satisfied that the accused is no longer mentally disordered or intellectually handicapped or is otherwise fit to be discharged, order his discharge and, where appropriate, his release from custody.<sup>27</sup>

Within 14 days after the accused person has been received into an institution under the first of the above options, the superintendent of the institution must issue a written certificate about the accused’s mental condition, and the certificate is sent to a three-member special board<sup>28</sup> with a copy to the Prosecutor-General, and the special board makes recommendations as to the accused person’s release, detention, care, management and treatment. The board’s recommendations are sent to the Mental Health Review Tribunal<sup>29</sup>, again with a copy to the Prosecutor-General, for review.<sup>30</sup>

---

<sup>23</sup> *S v Mageza* 1979 RLR 399 (G) at 400, which referred to *R v Ayling* 1969 (2) RLR 426 (G).

<sup>24</sup> Section 30 of the Mental Health Act [*Chapter 15:12*].

<sup>25</sup> “Act” is defined in section 29(1) of the Mental Health Act [*Chapter 15:12*] as including an omission.

<sup>26</sup> This reference is incorrect — it should be to section 227 of the Criminal Law Code.

<sup>27</sup> Section 29 of the Mental Health Act [*Chapter 15:12*].

<sup>28</sup> Established by the Minister of Health in terms of section 73 of the Mental Health Act [*Chapter 15:12*].

<sup>29</sup> Established under section 75 of the Mental Health Act [*Chapter 15:12*]. It is chaired by a judge or former judge and has general oversight over the treatment of mental patients, both civil and criminal, in order to ensure that their rights are respected.

<sup>30</sup> Section 29(4) to (6) of the Mental Health Act [*Chapter 15:12*].

It should be pointed out that before the Mental Health Act [*Chapter 15:12*] came into force in 2000, the consequences of a “special verdict” were much more drastic for the accused person. A court had to order the accused’s further detention in an institution after giving a special verdict, even if the accused was charged with a petty crime and even if he had recovered by the time of the trial.

### **Requirements for special verdict**

For a defence of insanity to succeed and a special verdict to be returned, the accused must show that at the time of committing the act, he or she was suffering from a mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind, however caused, which made him:

- incapable of appreciating the nature of his conduct, and/or of appreciating that his conduct was unlawful; or
- incapable of acting in accordance with any appreciation he may have of the nature of his conduct and/or that his conduct was unlawful.<sup>31</sup>

Even temporary mental disorder may entitle an accused person to a special verdict.<sup>32</sup>

The burden of proof of a defence of insanity lies on the accused person, and it is discharged by proof on a balance of probabilities.<sup>33</sup> It has been said that it is illogical to place the burden of proving insanity upon the accused, because he is the person least capable of discharging the burden and is often anxious to deny that he is insane.<sup>34</sup> However, there is nothing to prevent the prosecution from accepting that the accused was mentally disordered and undertaking the onus of proof, thereby assisting the court to come to a just conclusion.<sup>35</sup> In almost all cases, moreover, if the accused claims to have been mentally disordered or intellectually handicapped when he committed the crime, he is examined at State expense and the defence and prosecution accept the findings of the medical practitioners who examined him.

### **Evidence required for special verdict**

Section 29 of the Mental Health Act [*Chapter 15:12*] states that a special verdict can be given if the court is satisfied from “evidence, including medical evidence” that the accused person was mentally disordered or intellectually handicapped when the crime was committed. This seems to mean that medical evidence is essential, but it has been held that it is not always necessary.<sup>36</sup>

---

<sup>31</sup> This is a paraphrase of section 227 of the Criminal Law Code.

<sup>32</sup> See for example *S v Machona* 2002 (1) ZLR 61 (H), where the accused suffered a brief psychotic episode during which he attacked and seriously injured a doctor who was treating him. He was found not guilty by reason of insanity and, having recovered from the episode, was released from custody.

<sup>33</sup> Section 18(4) (proviso) of the Criminal Law Code.

<sup>34</sup> *R v Benjamin* 1968 (1) RLR 126 (G); *S v Taanorwa* 1987 (1) ZLR 62 (S) at 65.

<sup>35</sup> *R v Benjamin* 1968 (1) RLR 126 (G) at 127 A-B.

<sup>36</sup> *R v Moyo* 1969 (2) RLR 111 (G) at 115-6, where the medical evidence was ambivalent and the court based its verdict on the extraordinary nature of the accused’s actions.

## What constitutes mental disorder or intellectual handicap<sup>37</sup>

The term “mentally disordered or intellectually handicapped person” is defined in the Mental Health Act [*Chapter 15:12*] as a person who is “suffering from mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind”. This is a wide definition, but the term “mentally disordered or intellectually handicapped” in section 29 extends beyond the definition. It can cover a purely temporary condition, however caused. The only issue is whether the accused’s mental condition prevents or prevented him from knowing the nature and quality of his act or that his act was wrong, or whether it gives or gave rise to an irresistible impulse.

The following conditions (listed in John Reid Rowland’s book *Criminal Procedure in Zimbabwe* at p. 12-11) have been held to amount to a mental disorder or intellectual handicap which could give rise to a special verdict:

- a state of automatism due to head injuries received;<sup>38</sup>
- feeble-mindedness which results in an adult having the mental age of a young child;<sup>39</sup>
- a state of hysterical dissociation associated with a trance;<sup>40</sup>
- a somnambulistic (i.e. sleep-walking) condition;<sup>41</sup>
- irresistible impulse resulting from a disease of the mind, if the impulse could not have been resisted by the accused in the particular circumstances, even though he may have known that his act was wrong.<sup>42</sup>
- consumption of drugs or alcohol resulting in a mental disease such as *delirium tremens*, though normally voluntary intoxication does not give rise to a special verdict even if it renders the accused incapable of knowing that what he was doing was wrong.<sup>43</sup>

On the other hand, a black-out caused by tiredness and overwork rather than injury, which results in a temporary loss of memory, consciousness and vision, does not constitute a mental disorder or intellectual handicap that would justify a special verdict.<sup>44</sup> And amnesia, or an inability to remember what happened, would not justify a special verdict unless it was associated with a mental disorder or unconscious action amounting to automatism.<sup>45</sup>

## Deaf mutes

People who are deaf or mute, or both, are not mentally disordered, but communicating with them may cause problems, so if such a person is an accused in a criminal trial it may be necessary to find someone who is conversant with sign language to act as an interpreter, if the accused has been trained in that language.

---

<sup>37</sup> For a detailed discussion of this topic, see Burchell & Hunt *S.A. Criminal Law and Procedure* 2nd ed vol 1 pp 258 ff.

<sup>38</sup> *Attorney-General v Senekal* 1969 (2) RLR 368 (A).

<sup>39</sup> *R v Joseph* 1968 (2) RLR 243 (A).

<sup>40</sup> *R v Mawonani* 1970 (1) RLR 41 (A).

<sup>41</sup> *S v Ncube* 1977 (2) RLR 304 (G).

<sup>42</sup> J. Reid Rowland *op cit* p. 12-12.

<sup>43</sup> J. Reid Rowland “Is Voluntary Intoxication a Mental Disorder?” 1971 (2) RLJ 145.

<sup>44</sup> *S v Evans* 1985 (1) ZLR 95 (S) at 108.

<sup>45</sup> *R v Johnson* 1970 (1) RLR 58 (G).

Section 193 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] deals with the situation where an accused person is unable to conduct his defence properly because he is deaf or mute or both, although he is not mentally disordered or intellectually handicapped. If the court is satisfied, having heard evidence, that it is in the interests of public safety or for the protection of the accused that he should be kept in custody, the court may order that he be kept in custody in a prison. The nature of the evidence to be led is not specified, but there would need to be convincing medical evidence of the need to incarcerate the accused before such an order could be justified. If such an order is made, it must be transmitted to the Minister responsible for justice, who ascertains the President's decision for the further detention or care of the accused.

**Query:** Is this procedure constitutional in the light of section 49 of the Constitution?  
Probably not.

## 11. CHARGES AND INDICTMENTS

### Nature of charges

These are dealt with in Part X of the Criminal Procedure and Evidence Act. The charge in a criminal trial serves roughly the same function as a summons in a civil trial.

In the High Court, charges are contained in a document called an “indictment”; in magistrates courts, the document is called a “summons” or “charge sheet”. The preambles to these documents are different, but the wording of the charges in them will follow the same form.

Where more than one charge is set out in an indictment, summons or charge-sheet, they are called “counts”.

The purpose of a charge is to tell the accused in clear and unmistakable language what the charge is that he has to meet. As the Criminal Procedure and Evidence Act puts it, a charge must:

“set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.”<sup>1</sup>

As with a civil summons, the charge must not be vague and embarrassing so that the accused has to puzzle out what the real charge is that he faces. So:

- a charge will be defective if it does not disclose a crime, in the same way that a civil summons must disclose a cause of action.<sup>2</sup>
- a charge must set out the crime, not necessarily the evidence necessary to prove the crime.

As a rule, a person cannot be found guilty of a crime of which he has not been charged, but there are exceptions: for example, permissible (competent) verdicts — see the Fourth Schedule to the Criminal Law Code. So a person charged with robbery can be found guilty of assault or theft.

### Choice of crime to charge

An accused person’s conduct may constitute more than one crime, and it is for the Prosecutor-General or the public prosecutor to choose which crime to charge. The discretion of the Prosecutor-General or the prosecutor in this regard is usually regarded as absolute — the court cannot order that the accused be charged with a different crime. If, however, an inappropriate charge has been selected the High Court on review can refuse to certify the proceedings as being in accordance with real and substantial justice.<sup>3</sup>

---

<sup>1</sup> Section 146(1) of the Criminal Procedure and Evidence Act. The “nature of the offence” means the material facts constituting the offence: *R v Wantenaar* 1940 SR 174.

<sup>2</sup> *R v Mlotshwa* 1968 (2) RLR 172 (G) at 174-5.

<sup>3</sup> See Reid Rowland *Criminal Procedure in Zimbabwe* p. 3-10. In *S v Thebe* 2006 (1) ZLR 208 (H), the court suggested (wrongly, it is submitted) that judicial officers could interfere with the prosecutor’s choice as to the crime to be charged.

## Essentials of charge

Indictments and charge sheets must specify the accused's full name.<sup>4</sup> Aliases should not be given, since they suggest that the accused has had previous run-ins with the police.<sup>5</sup>

Charge sheets in the magistrates court must specify the accused's home address and occupation.<sup>6</sup> If, however, the accused's occupation is illegal or undesirable, it should be left out. It is prejudicial, for example to call an accused "a loafer" in the charge.<sup>7</sup>

Companies must be given their ordinary name in an indictment or charge sheet (e.g. "XYZ (Pvt) Ltd") and it is not necessary to specify that a company is "a limited liability company there carrying on business". Partnerships and firms can be given their ordinary title. It is not necessary to add the names of shareholders or partners, unless they are being charged separately.<sup>8</sup>

All charges must specify<sup>9</sup>:

- the nature of the charge, that is to say all the averments that make up the essential elements of the crime;<sup>10</sup>
- reasonably sufficient particulars as to the date and place at which the crime was committed;
- reasonably sufficient particulars as to any person against whom the crime was committed; and
- reasonably sufficient particulars as to any property in respect of which the crime was committed.

Example:

"The accused is charged with the crime of assault, in that on the 5th April, 2005, and in Samora Machel Avenue, Harare, the accused unlawfully and intentionally assaulted Innocent Ndoro by punching him in the face with his fist.

The accused is entitled to demand that he be informed with precision, or at least with a reasonable degree of clarity, of the case he has to meet, so that he fully understands the nature of the charge he is facing.<sup>11</sup>

## Contents of charge

### 1. Particulars of the accused

The fact that the accused is of a particular age, gender or race is irrelevant. Equally irrelevant is the age, gender or race of the complainant (though for some crimes gender and age are important — for example, having sexual intercourse with a young person in contraven-

---

<sup>4</sup> The Criminal Procedure and Evidence Act does not specifically state this requirement for indictments in the High Court, though it is implied. For magistrates courts, the requirement is stated in sections 139, 141 and 142.

<sup>5</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 10-4.

<sup>6</sup> Section 139 of the Criminal Procedure and Evidence Act.

<sup>7</sup> *S v Tashangase* 1966 (1) SA 606 (E).

<sup>8</sup> Section 152 of the Criminal Procedure and Evidence Act.

<sup>9</sup> Section 146 of the Criminal Procedure and Evidence Act.

<sup>10</sup> *R v Wantenaar* 1940 SR 174.

<sup>11</sup> *S v Sikaruma* 1984 (1) ZLR 170 (H).

tion of section 70 of the Criminal Law Code). There is no need to use phrases such as “a woman there residing”. The accused’s aliases should not be used in a charge, only his name as given to the Police.

## **2. Time and place of crime**

The date of the crime should be stated (day, month, year) but not the time unless time is an element of the crime (e.g., where the crime can only be committed at night). If the date is not known, it is permissible to say the crime was committed “on or about” a particular date, or between two specific dates.

If the place where the crime was committed is precisely known, it should be inserted in the charge. If not, it is permissible to say “at or near” such and such a place. Be careful of the “at or near” formula: in *R v van Biljon* 1949 (3) SA 1212 (T), a charge of drunken driving alleged that the crime was committed “at or near” a public road. The charge was held to be defective because the crime could only be committed by driving “upon” a public road. The place where the crime was committed needs to be specified in magistrates court trials because, apart from giving the accused necessary information, it will also enable the magistrate to ascertain whether or not the crime was committed within his or her area of jurisdiction.

Remember section 173 of the Criminal Procedure and Evidence Act: in most cases, where time is not the essence of the crime, it is enough for the prosecution to prove that the crime was committed within three months of the date specified in the charge.

Where several crimes are committed over a period or where even the approximate dates are unknown, one can use the formula:

“On a date unknown to the prosecutor, but during the period extending from the ... to the ...”

If it is known that the accused’s defence is an alibi, the date must be specified exactly in the charge.

## **3. Essentials of the crime**

These will usually fall into the two categories of *actus reus* and *mens rea*.

The element of unlawfulness which categorises *actus reus* is expressed in charges by the word “unlawfully”. The element of *mens rea* is expressed by the word “intentionally”. It is not necessary to use the word “wrongfully” as well. If, however, the accused is charged with a statutory crime which requires the accused to have acted “knowingly” or “maliciously”, then those words should be used otherwise the charge may not disclose a crime.

Generally, for statutory crimes, it is enough to repeat the words of the statutory provision concerned: section 146(2)(a) of the Criminal Procedure and Evidence Act.

For some crimes, *mens rea* is not an element — crimes of strict liability — and in such cases *mens rea* should not be alleged.<sup>12</sup>

The facts alleged in the charge must disclose a crime.<sup>13</sup>

A charge of a statutory crime should refer to the section of the statute that is alleged to have been contravened. If it doesn’t, or if an incorrect section is cited, this will not invalidate the charge if, notwithstanding the error, the charge describes the crime with sufficient accuracy

---

<sup>12</sup> The test for determining whether a crime is one of strict liability is set out in section 17(5) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

<sup>13</sup> *S v Mlotshwa* 1968 (2) RLR 172 (G).

so that no prejudice can be said to have accrued to the accused. The test remains one of prejudice to the accused.

A charge of a statutory crime need not refer to the penalty that may be imposed on the accused, unless it is a mandatory minimum penalty. In that event, the penalty should be specified.<sup>14</sup>

If a statute prohibits something unless the accused can show a lawful excuse, or unless the accused has “reasonable cause”, etc, those words should form part of the charge in order to inform the accused that he has a defence if he can raise a lawful excuse, or show reasonable cause.<sup>15</sup>

## Particular crimes

### ***Crimes requiring particular intent***

If a crime requires a particular form of mens rea — for example, if the act constituting the crime must be committed recklessly, knowingly, wilfully, corruptly or intentionally — the charge must reflect this. It is not a fatal defect to fail to make such an allegation, however, so long as there is evidence at the trial to cure the defect.<sup>16</sup>

### ***Theft***

In a charge of theft of money or property by a person to whom the money or property was entrusted, it is sufficient to allege that there was a general deficiency in the money or property held by that person. The charge would allege that the accused received the money or property, and that there was a general deficiency in it of a stated amount, which the accused converted to his own use.<sup>17</sup>

Where an accused is charged with theft of money, it is not necessary to specify the particular notes that were stolen; the amount of money is all that is needed.<sup>18</sup>

## Section 146(2)

Although a charge must be sufficient to inform the accused of the nature of the charge (section 146(1) of the Criminal Procedure and Evidence Act), section 146(2) provides important exceptions to this rule, which can make it difficult for an accused person to know the precise nature of the charge against him:

- *Section 146(2)(a)*: a description of a statutory crime, in the words of the enactment creating the crime, or in similar words, is sufficient in any charge. This can cause problems if there are several different ways set out in a statute as to how a crime can be committed. For example, in *R v Rabe* 1947 (2) SA 1198 (C), the accused was charged with “selling” adulterated milk. There was an extended definition of “sell” which included offering, advertising, keeping, exposing, transmitting, consigning, conveying or delivering milk for sale. It was held that the charge should have indicated in what way the accused was alleged to have “sold” the milk.

---

<sup>14</sup> *S v Zvinyenge & Ors* 1987 (2) ZLR 42 (S) at 46.

<sup>15</sup> *S v Janyure* 1988 (2) ZLR 470 (S) at 474.

<sup>16</sup> Section 203 of the Criminal Procedure and Evidence Act.

<sup>17</sup> Section 148 of the Criminal Procedure and Evidence Act.

<sup>18</sup> Section 149 of the Criminal Procedure and Evidence Act.

Another problem arises if the section does not create a crime on its own: In *R v Freitag* 1953 (2) SA 178 (E), the accused was charged with “carrying on motor carrier transportation” in contravention of a section of a statute; the phrase “motor carrier transportation” was defined in another section as operating a vehicle for reward. The charge did not allege that the accused operated his vehicle for reward, and was therefore held to be defective. This problem occurs frequently when a statutory provision states that “No person shall” do something, and another provision of the statute states that contravention of the first-mentioned provision is a crime. It is necessary to cite both provisions in the charge.

- *Section 146(2)(b)*: An exception, exemption, proviso, excuse or qualification in the description of a crime, need not be alleged and, if alleged, need not be proved by the prosecution. Sometimes it is not clear whether a particular part of an enactment is creating an exception, or whether it is part of the crime. For example, if a statute makes it a crime to walk down a street unless decently dressed: what is the prohibition here? In this case it is obvious, but it is not always so:
  - Practising as a lawyer without a practising certificate.
  - A person, not being a member of the Police Service, holding himself out to be a member of the Service.
  - Dealing in uncut diamonds without being in possession of a licence.  
If the crime is dealing in uncut diamonds, it will be sufficient for the State to charge the accused with dealing in them, and to leave out any reference to his not having a licence. It would then be up to the accused to prove that he has a licence.<sup>19</sup>

One test to be used in determining whether a provision which accompanies a statutory crime is actually an exemption or exception or is an additional element of the crime, is to decide whether, if all references to the exceptions relevant to the case are eliminated from the charge, what remains of the charge discloses the crime.<sup>20</sup>

### **Joinder of counts**

In terms of section 144 of the Criminal Procedure and Evidence Act, any number of charges may be joined in the same proceedings against an accused. Each charge is then numbered consecutively: count 1, count 2, count 3 and so on. Each such charge should contain one crime only.

If there are a large number of counts, particularly if they are similar, they can be listed in a schedule attached to the charge sheet:

“The accused is charged with 10 counts of the crime of fraud, in that on the dates mentioned in the first column of the attached schedule, and at the places mentioned in the second column of the schedule, the accused unlawfully and fraudulently misrepresented to persons mentioned in the third column of the schedule that ...”

The purpose of a joinder of counts is to save time and trouble. It is also to ensure that all charges the State has against an accused are brought against him at the same trial rather than piecemeal.<sup>21</sup>

---

<sup>19</sup> *R v Zondagh* 1931 AD 8.

<sup>20</sup> *Attorney-General v Makamba* 2005 (2) ZLR 54 (S) at 59F.

<sup>21</sup> *Paweni & Anor v Attorney-General* 1984 (2) ZLR 39 (S) at 45G.

If the court considers that it is desirable in the interests of justice to do so, it may order that the accused should be tried separately on any one or more of the counts set out in a charge sheet or indictment. The counts that are not tried can be the subject of fresh proceedings.<sup>22</sup> Before a court would be justified in ordering a separation of trials, there would have to be some special feature rendering a single trial prejudicial or embarrassing to the accused.<sup>23</sup>

### **Alternative charges**

If for any reason it is doubtful which of several different crimes an accused person has committed, it is permissible to charge him with each of those crimes as alternative counts in the indictment, summons or charge sheet.<sup>24</sup> If so charged, he can be convicted of only one of the crimes.

Usually the most serious crime is set out first on the indictment, summons or charge sheet, but there is no rule to this effect.

Some crimes are usually charged together as alternatives: e.g. culpable homicide arising out of a traffic accident is usually coupled with an alternative of negligent driving or, if the accused has been drinking, with one of drunken driving.

### **Further particulars**

It is open to the accused to ask for further particulars of a charge, and the prosecutor must supply them if the court orders him to do so.<sup>25</sup> The court can also *mero motu* order particulars to be given.

This is particularly important in cases under the Road Traffic Act where the accused is charged with negligent driving (and in other cases where the accused is charged with a crime involving negligence). The prosecutor should be asked as a matter of course to supply particulars of the negligence (e.g. driving at excessive speed, failing to drive carefully when in the vicinity of children, etc) and, once supplied, the prosecutor is restricted to those particulars.<sup>26</sup> When asked for such particulars, a prosecutor should not frame them covering every conceivable way of being negligent, but simply cover the negligence which is reasonably attributable to the accused's conduct.

### **Defects in charges**

Section 172 of the Criminal Procedure and Evidence Act sets out various errors or deficiencies that will not result in the charges being held defective:

#### ***Failure to allege anything which it is unnecessary to prove.***

Not always easy to determine what is covered by this: for example, if an essential element of a crime is the subject of a presumption which facilitates proof.

---

<sup>22</sup> Section 144(3) of the Criminal Procedure and Evidence Act.

<sup>23</sup> *Paweni & Anor v Attorney-General* 1984 (2) ZLR 39 (S) at 45-6; Reid Rowland *Criminal Procedure in Zimbabwe* p. 10-25.

<sup>24</sup> Section 145 of the Criminal Procedure and Evidence Act.

<sup>25</sup> Section 177 of the Criminal Procedure and Evidence Act.

<sup>26</sup> Cf *S v Makhado* 1999 (1) ZLR 468 (H).

### ***Incorrect designation of a person mentioned in the charge***

If a person is designated in the charge by his or her office or title rather than being named, the proceedings are not invalidated. For example, if a charge alleges that the accused falsely made a statement to the police officer in charge of XYZ police station, and does not name the police officer concerned, the charge is valid

### ***Omission to state the time of the crime***

As already stated, this does not apply if the time at which the crime is committed is important (e.g. the crime of “found by night”).

### ***Wrong date specified in the charge, or no time mentioned***

As indicated above, if “time is not of the essence” of the crime, a charge will not be regarded as defective for wrongly stating the date on which the crime was committed, so long as the crime is proved to have been committed within three months before or after the date specified in the charge.<sup>27</sup> If the wrong date is alleged, the charge can be amended — unless to do so would prejudice the accused in his defence.<sup>28</sup>

If, however, time is of the essence of the crime the above rule does not apply. Time will be of the essence where, for example, the accused’s defence is an alibi.<sup>29</sup> In such a case, if the court considers the accused would be prejudiced in his defence if the State adduced evidence that the crime was committed at a time other than that specified in the charge, then the court must reject that evidence, and in that event the accused will be in the same condition as though he had not pleaded.<sup>30</sup> So fresh proceedings can be instituted against him, though presumably not before the same judicial officer.

### ***Want of or imperfection in the addition of an accused or other person***

This means that the accused cannot object if the charge fails to allege that another person was also involved in the commission of the crime, or if the charge fails to mention, for example, that more than one complainant was involved.

### ***Failure to mention the value or price of anything, or the amount of damage etc.***

It is not necessary to allege the value or price of goods in respect of which the crime was committed — e.g. goods allegedly stolen by the accused. And in cases of malicious damage to property it is unnecessary to specify the amount of the loss caused by the damage. This does not apply, however, if the value, price or amount is an essential element of the crime.

In all the cases mentioned in section 172, however, it is submitted that if the error or deficiency causes prejudice to the accused the charge will be ruled defective unless it is amended.

---

<sup>27</sup> Section 173(a) of the Criminal Procedure and Evidence Act.

<sup>28</sup> Section 173 of the Criminal Procedure and Evidence Act.

<sup>29</sup> *Alibi* is Latin for “elsewhere”. When an accused claims that he was somewhere else when the crime was committed, he is setting up a defence of an alibi, and for the success of such a defence it is often — though not always — important to pinpoint when the crime was committed.

<sup>30</sup> Section 175 as read with 173(b) of the Criminal Procedure and Evidence Act.

## **Defect in charge cured by evidence**

Section 203 of the Criminal Procedure and Evidence Act allows a defective charge to be “cured” by evidence led at the trial. If a charge is defective because it is missing averments of anything which is an essential element of the crime, the defect will be cured by evidence proving the thing that was omitted. For example, in *S v Ndhlovu* 1984 (1) ZLR 175 (S), the accused was charged under the Witchcraft Suppression Act with naming the complainant as a witch; in fact, the relevant section required the imputation to be that of causing a disease in any person. This defect was held to have been cured by the evidence, since it showed that the appellant had accused the complainant of having caused a child’s illness.

However, if the charge is fatally defective it cannot be “cured”.

## **Amendment of charge**

Section 202 of the Criminal Procedure and Evidence Act gives the court a broad power to amend a charge, even one that did not disclose a crime, but:

- The court’s power is limited to the period before judgment;
- There must be no prejudice to the accused in his defence.<sup>31</sup> What this means is that he must not be placed in a worse position than he would have been in, in relation to his defence, if the words had been added to the charge when he was called upon to plead. For example, in *S v Ndhlovu & Ors* 1979 RLR 236 (G), it was held permissible to alter a charge of housebreaking with intent unknown to one of housebreaking with intent to steal and theft, since the accuseds’ defence was an alibi.

Before a charge is amended by the court, the accused must be afforded an opportunity of showing whether there will be any prejudice to him in conducting his defence.

### ***When amendment is not allowed***

1. As a rule, amendment will not be allowed where there is prejudice to the accused in his defence. The test is whether the accused would be placed in no worse position than if the charge had been framed in its amended form when he was first called to plead to it.
2. An amendment must not introduce an entirely new charge.<sup>32</sup> For example, a charge of assault cannot be altered to one of theft or rape.
3. An amendment may not introduce a new accused: a charge against an individual cannot be amended to one against him in his representative capacity as director of a company.
4. An amendment will not be allowed where it is clear that the evidence will not support the amendment.

### ***Amendment on appeal***

1. Generally, formal defects in a charge, which are clear from the face of the charge, cannot be relied on for the first time on appeal.
2. Material defects of such a nature that the charge does not disclose a crime cannot be amended on appeal, if the defects have not been cured by evidence at the trial.

---

<sup>31</sup> *S v Mutizwa* 2006 (1) ZLR 78 (H) at 84H.

<sup>32</sup> *S v Collett (2)* 1978 RLR 288 (G).

3. A charge will not be amended on appeal where the effect of the amendment would be to frame a new charge against the accused and to convict him of a charge which was never put to him.
4. Where the charge, though materially defective, discloses a crime, the defect cannot be relied upon if the charge could have been amended at the trial without prejudicing the accused's defence.
5. If, however, the accused applied at the trial to have the charge amended and the application was refused, then the charge will be regarded as fatally defective if the refusal resulted in prejudice to the accused's defence.<sup>33</sup>

## **Splitting of charges**

### ***What is splitting of charges?***

Splitting of charges is not permissible. That is to say, the State should not bring more than one criminal charge against an accused person in respect of what is really a single act or course of conduct. To take an obvious example, if an accused person commits a robbery by pointing a firearm at his victim and taking the victim's money, it would be correct to charge the accused with a single count of robbery. It would amount to splitting charges, on the other hand, to charge the accused with pointing a firearm in contravention of the Firearms Act, and with extortion (i.e. demanding money) and with theft of the money.

The reasons why splitting of charges is not allowed are:

- The overriding reason is that it leads to a duplication of convictions so that the accused may be punished more than once for what is really a single crime. This would be unjust.<sup>34</sup>
- It would enable a magistrate, whose sentencing jurisdiction is limited, to impose an overall punishment in excess of his jurisdiction.
- It loses sight of the fact that the accused's conduct consists of a single transaction, motivated by a single purpose.
- To impose several punishments for a single course of conduct is unjust.
- One count may unfairly be treated as a previous conviction in the assessment of punishment, if the different charges are tried separately.

Splitting of charges is sometimes called "duplication of convictions", which expresses the concern of the courts more clearly: the concern is that by multiplying the crimes of which the accused person is convicted, the court may impose an excessive sentence upon him.<sup>35</sup>

Apart from that, it should be noted that splitting of charges has nothing to do with sentence. A court can convict and sentence an accused only for the crime with which he has been charged, or for a crime that is a competent verdict on a charge of that crime. At the sentencing stage the court cannot split up the crime with which the accused is charged into its component elements and impose sentence separately on each of those elements. For example, if an accused has been charged with robbery and has pleaded to that charge, the court must convict or acquit him of robbery. It cannot convict the accused of robbery and then

---

<sup>33</sup> Section 202(3) of the Criminal Procedure and Evidence Act.

<sup>34</sup> See the discussion in Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 215.

<sup>35</sup> *S v Zacharia* 2002 (1) ZLR 48 (H).

sentence him for theft and assault, nor can it convict the accused of theft and assault and then sentence him for those two crimes.

### **Test for splitting of charges**

There are two tests:

- The “single intent” test: where a person commits two acts, each of which is criminal if it stood alone, but he does so with a single intent and both acts are necessary to carry out that intent, then he should be charged with a single crime (i.e. the crime which he intended to commit) rather than separately with the two crimes.

Examples of this are<sup>36</sup>:

- Assault and intentional damage to property, where the accused assaulted a person and tore the person’s clothes in the process.<sup>37</sup>
  - Robbery and impersonation of a police officer, where the impersonation was done in order to carry out the robbery.<sup>38</sup>
  - Obstructing the course of justice and malicious damage to property, where the accused threw stones and damaged a police vehicle in an attempt to prevent the police from arresting his brother.<sup>39</sup>
- The “similar evidence” test: if the evidence necessary to prove one charge necessarily involves proving the other, it is generally improper to charge both separately. The State must decide which one to bring. The test applies only where the evidence is necessary to prove an essential element of the crime.

Examples of this are:

- A charge of negligent driving and drunken driving arising out of a single act of driving a motor vehicle.<sup>40</sup>
- A charge of rape and incest arising out of the same act of sexual intercourse by a father on his young daughter.<sup>41</sup>
- Two charges of culpable homicide arising out of the killing of two people in a single road accident. In such a case a single charge should make reference to both the deceased.<sup>42</sup>

Where unlawful acts are committed at practically the same time, it will often (though not always) amount to splitting to charge them separately.

Where a single act constitutes more than one crime (for example, where a single act of sexual intercourse constitutes rape and incest) then the State must decide which crime to charge. Usually the most appropriate is the one which represents the accused dominant intention.<sup>43</sup> If prosecutors are uncertain which charge to bring, they should consider bringing alternative charges.

---

<sup>36</sup> These and more examples are to be found in Reid Rowland *Criminal Procedure in Zimbabwe* p. 10-27.

<sup>37</sup> *R v Frank* 1968 (2) RLR 257 (A).

<sup>38</sup> *S v Simon* 1980 ZLR 162 (G).

<sup>39</sup> *S v Mupatsi* 2010 (2) ZLR 529 (H).

<sup>40</sup> *S v dos Ramos* 1978 RLR 297 (A).

<sup>41</sup> *R v T* 1940 CPD 14, cited in Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 216.

<sup>42</sup> *S v Mampa* 1985 (4) SA 633 (C).

<sup>43</sup> See for example, *S v Mupatsi* 2010 (2) ZLR 529 (H).

## Withdrawal of charges

The prosecutor is entitled to withdraw charges against the accused at any stage, whether before or after the accused has pleaded to them.

### ***Withdrawal before plea***

If the prosecutor withdraws charges before plea, the accused person can be charged again later. He is not entitled to an acquittal, but if he is in custody he must be released (unless he is facing other charges).<sup>44</sup>

The decision to withdraw is the prosecutor's alone. Once he has indicated his intention to withdraw charges, the court is not empowered to order that a charge be put to the accused. The act of withdrawing terminates the proceedings against the accused.

### ***Withdrawal after plea***

If the prosecutor withdraws charges after the accused has pleaded but before judgment, the accused is entitled to an acquittal<sup>45</sup> and he cannot be charged again with the same crime (because once he pleaded he was in jeopardy of being convicted of the crime and if he is charged again he would be entitled to plead *autrefois acquit*). Again, the decision to withdraw is the prosecutor's alone and the court is not entitled to proceed with the trial after a withdrawal.<sup>46</sup>

A prosecutor cannot, however, withdraw a charge after the accused has been convicted because the court, having pronounced its verdict, is *functus officio* in regard to verdict.<sup>47</sup>

---

<sup>44</sup> Sections 8(a) and 321 of the Criminal Procedure and Evidence Act.

<sup>45</sup> Section 8(b) of the Criminal Procedure and Evidence Act.

<sup>46</sup> *Scott v Additional Magistrate, Pretoria, & Anor* 1956 (2) SA 655 (T).

<sup>47</sup> *R v Ryder-Jones* 1962 R & N 833 (SR).

## 12. JOINDER AND SEPARATION OF TRIALS

### Joinder of accused

People implicated in the same crime may be tried together in the same trial. This covers:<sup>1</sup>

- persons charged as actual offenders, accomplices, co-perpetrators or accessories, even if the extent of their participation was different and took place at different times;
- persons charged with receiving property obtained by means of a single crime, even if the receiving took place at different times.

As a general rule, the holding of a mass trial of a number of accused at the same time on charges that are not related to each other, is highly irregular,<sup>2</sup> except in the circumstances described in section 159 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Under that section, people who are not implicated in the same crime may be tried together, if their crimes were committed at the same time and place or at the same place and about the same time. If they are tried together, the prosecutor must inform the court that evidence which is, in his opinion, admissible at the trial of [one of] those persons is also admissible against the other or others.<sup>3</sup> The application of this provision (section 159 of the Criminal Procedure and Evidence Act) is unclear.<sup>4</sup> While mass trials on charges that are unrelated to each other are undesirable, the provision probably allows joint trials to take place in the following circumstances:

- Several persons stealing maize from the same field at about the same time.<sup>5</sup>
- Two or more people who committed perjury at the same trial in the same respect.
- Two motorists who negligently collide at an intersection.

As a general rule an accused person cannot demand that he be tried with anyone else.<sup>6</sup> It is for the prosecutor to decide whether or not to try persons jointly or separately. While it is in the interests of society as well as justice that perpetrators of the same crime should be tried jointly,<sup>7</sup> this does not mean that a trial is unfair because other possible perpetrators are not charged together with an accused. The ultimate question is whether a particular trial was unfair.<sup>8</sup>

### Separation of trials

Where two or more persons are jointly charged, the court may at any time during their trial direct that the trial of one or more of them should be held separately from that of the other

---

<sup>1</sup> Section 158 of the Criminal Procedure and Evidence Act.

<sup>2</sup> *S v Marimo & Ors, S v Ndhlovu & Ors* 1973 (1) RLR 70 (G).

<sup>3</sup> Section 159 of the Criminal Procedure and Evidence Act. The words in square brackets do not appear in section 159 but seem necessary to give it proper meaning. They do appear in the equivalent section of the South African Act (section 156 of the Criminal Procedure Act, 1977).

<sup>4</sup> See Reid Rowland *Criminal Procedure in Zimbabwe* p. 15–13.

<sup>5</sup> As in *S v Tereza & Ors; S v Leonard & Ors* 1971 (1) RLR 12 (G), which was decided before section 159 was enacted.

<sup>6</sup> Section 172(e) of the Criminal Procedure and Evidence Act.

<sup>7</sup> *S v Shuma & Anor* 1994 (4) SA 583 (E) at 586J.

<sup>8</sup> *S v Shaik & Ors* 2008 (2) SA 208 (CC) at 232-3.

or others.<sup>9</sup> The court may make such an order on the application of the prosecutor or the accused, but cannot do so *mero motu*.<sup>10</sup> If the court orders a separation, the case subsequently proceeded with must be begun afresh.

It is well established that trials should be separated where one of the accused pleads guilty but the other pleads not guilty;<sup>11</sup> if separation is not granted in such a case there is a danger that one of the accused will be prejudiced by evidence given by the other or others, whether under cross-examination or otherwise. Where possible the same judicial officer should try the various cases, and they should all be brought up at the same time for sentence.<sup>12</sup> This avoids widely divergent sentences being imposed on equally blameworthy accused persons.

In many cases an application for separation of trials will be made by the defence, since the State has already decided to proceed against the accused persons together. If however one accused pleads guilty while the other or others plead not guilty, the prosecution may want to make an application for separation. The test, in deciding whether to order separation of trials, is whether a joint trial is likely to prejudice (i.e. to do an injustice to) the accused. A bare possibility of prejudice is not enough; it must be established that the joint trial is likely to do the accused an injustice.<sup>13</sup> A trial court's decision to refuse separation will be interfered with on appeal only if the decision amounted to such a gross misdirection that it resulted in a failure of justice.<sup>14</sup>

Points to note:

- As a rule, persons who are charged jointly should be tried jointly.<sup>15</sup>
- The decision to separate trials is one for the judicial officer, and he must exercise his discretion in a judicial manner in the interests of justice, taking into account and considering all relevant facts.<sup>16</sup>
- The fact that evidence may be admissible against one accused but inadmissible against another (e.g. a confession made by one of the accused may incriminate the other accused) is an important consideration, but not decisive.<sup>17</sup>
- If a real danger exists that a separation of trials will hinder the State to such an extent in the presentation of its case that a miscarriage of justice results and a guilty person is released, this consideration is decisive.<sup>18</sup>
- If an accused person wishes to call a co-accused to give evidence in his defence, and the co-accused refuses to testify, refusal to order a separation of trials will limit the

---

<sup>9</sup> Section 190 of the Criminal Procedure and Evidence Act.

<sup>10</sup> *S v Kachipare* 1998 (2) ZLR 271 (S) at 275D. But see *S v Ndwandwe* 1970 (4) SA 502 (N), where it was held that whether an application for separation is made or not, a court should make such an order if a possibility of prejudice exists.

<sup>11</sup> *R v Zonele & Ors* 1959 (3) SA 319 (A) at 325D; *S v Andeya* 1981 ZLR 35 (A).

<sup>12</sup> *R v Rademeyer* 1959 (2) R & N 100 (SR) at 101E-G; Reid Rowland *Criminal Procedure in Zimbabwe* p. 15–15.

<sup>13</sup> *R v Nzuza & Anor* 1952 (4) SA 376 (A).

<sup>14</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 279.

<sup>15</sup> *R v Bagas* 1952 (1) SA 437 (A) at 441F-G.

<sup>16</sup> *R v Office & Anor* 1966 RLR 748 (A) at 750B-C; *S v Shuma & Anor* 1994 (4) SA 583 (E).

<sup>17</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 208.

<sup>18</sup> *R v Kritzinger* 1952 (4) SA 651 (W).

accused in his defence and may result in his conviction being set aside on appeal or review.<sup>19</sup>

---

<sup>19</sup> *S v Shuma & Anor* 1994 (4) SA 583 (E); Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 209.

## 13. EXTRA-CURIAL STATEMENTS

### What is an extra-curial statement?

An extra-curial statement is any statement made outside the court (*extra curiam*).<sup>1</sup> What we are concerned with here are statements made by accused persons outside the court, i.e. when they are not giving evidence in court. An extra-curial statement is often called a warned and cautioned statement, though as we shall see that is a term that describes statements made by the accused to the police after being warned and cautioned.

#### **Types of extra-curial statements**

1. An extra-curial statement may be written or oral. There is no rule that a statement must be reduced to writing, and the same rules as to admissibility govern oral and written statements.
2. An extra-curial statement may be inculpatory or exculpatory, or partly the one and partly the other. In Zimbabwe we do not have the distinction that exists in South Africa between confessions and admissions. In South Africa the rules for admissibility of confessions are different, and more stringent, than those for the admissibility of admissions. In Zimbabwe our rules are the same for all statements, and are similar to the South African rules applicable to admissions.
3. An extra-curial statement may be made to anyone, not just to a police officer. A statement made by an accused person to a bystander, or to a relative (other than his wife) will be admissible in evidence at his trial.
4. If an accused person makes a statement to a police officer after he has been warned and cautioned, the statement is known as a “warned and cautioned statement”. This is the type of statement that is most frequently produced in evidence in criminal trials.
5. There is the type of “statement” known as “indications” or “pointing out”, where the accused person shows the police something (e.g. shows the police where he buried stolen property). Very often this pointing out is accompanied by a statement.

### Admissibility of extra-curial statements

#### **General rule**

The rules for the admissibility of extra-curial statements fall within the ambit of the law of evidence, but it is useful to recapitulate them here.

An extra-curial statement is admissible against the accused person if tendered in evidence by the prosecutor at his trial, if the statement is proved to have been:

- made by an accused person;
- freely and voluntarily (i.e. not induced by any threat or promise proceeding from a person in authority<sup>2</sup>);
- without his having been unduly influenced to make it (i.e. there must not have been external influences that operated to negative the accused’s freedom of volition<sup>3</sup> — such

---

<sup>1</sup> See the article by Judge N.J. McNally, “Extra-curial Statements” in *Legal Forum* vol 4 no. 4 (Dec 1992).

<sup>2</sup> *R v Barlin* 1926 AD 459 at 462; Hoffmann & Zeffertt S.A. *Law of Evidence* 4th ed pp. 200 and 216.

<sup>3</sup> Hoffmann & Zeffertt S.A. *Law of Evidence* 4th ed p. 217.

influences may include violence, threats, promises or subtler influences. The courts in Zimbabwe, England and South Africa regard as “undue” any practice which, if introduced into a court of law, would be repugnant to the principles on which the criminal law is based.<sup>4</sup>);

This rule is codified in section 256 of the Criminal Procedure and Evidence Act, and applies whether the statement was made before or during the accused’s arrest, or afterwards, and whether the statement was oral or reduced to writing. The same rules for admissibility also apply whether the statement is exculpatory or incriminating.

Under section 256, once the State has proved that a statement has been made freely and voluntarily and without undue influence, it “shall be admissible” in evidence against the accused person. The court has no power to exclude it.<sup>5</sup>

Note that a statement that was made voluntarily may be excluded if it was unduly influenced.<sup>6</sup>

Note, too, that under the common law, and in South African law in regard to confessions, there is an additional requirement: that the accused must have been in his sound and sober senses when he made the statement, i.e. he must have known what he was saying.<sup>7</sup> This is not required under our Criminal Procedure and Evidence Act, though if it is shown that the accused was not in his sound and sober senses — that his mind was so disturbed as to deprive him of his reason — the statement would certainly be ruled inadmissible.

The general rule is founded on various considerations. As is so often the case in criminal procedure, there is a need to balance various considerations. On the one hand, the criminal justice system would collapse if the prosecution could not rely on self-incriminatory statements made by accused persons. On the other hand:

- there is a danger that such statements are untrue; the less voluntary they are, the greater this danger;
- there is a need to prevent misconduct by the police and other law-enforcement agencies;
- there is a general feeling that it is unjust to convict a person on a statement that has been unfairly obtained. In the USA it has been held that to admit in evidence an involuntary confession is to deny the accused his constitutional right to a fair trial.<sup>8</sup>

The onus of proving that an extra-curial statement is admissible rests on the prosecution — and it must be proved beyond a reasonable doubt.

### **Warning and caution**

The police customarily warn and caution an accused before recording a statement from him. This is a salutary practice, but not essential for the statement’s admissibility. If an

---

<sup>4</sup> *R v Hackwell & Ors* 1965 RLR 1 (A) at 17C. In *S v Zaranyika* 1997 (1) ZLR 539 (H) at 559D-E, Gillespie J said: “A confession or statement of an accused person can only be held to have been made without undue influence where the making of that statement is a voluntary exercise of the accused’s power to choose between silence or speech. If any factor external to that exercise of free will influence(s) the making of that statement, the question immediately arises whether that influence is undue. Previous decisions in this jurisdiction show that influence will be undue where the exercise of that external influence, if introduced in a court of law, would be repugnant to the principles upon which the criminal law is based.”

<sup>5</sup> *R v Sambo* 1964 RLR 565 (A) at 571E-F; 1965 (1) SA 640 (R, AD)

<sup>6</sup> *S v Pietersen & Ors* 1987 (4) SA 98 (C) at 100F.

<sup>7</sup> Hoffmann & Zeffertt *S.A. Law of Evidence* 4th ed p. 216.

<sup>8</sup> *Haynes v Washington* 373 US 503 (1963), cited in Hoffmann & Zeffertt *S.A. Law of Evidence* 4th ed p. 219.

accused person is warned and cautioned, it is desirable to give him particulars of how it is alleged the crime was committed, to the extent that the police know them, so that the accused understands what he is faced with. These particulars should be recorded in the preamble to the statement.<sup>9</sup> The accused must also be informed of his right to remain silent<sup>10</sup> and even if he has already been informed of this right it is desirable to mention it in the preamble.

### **Indications**

According to section 258(2) of the Criminal Procedure and Evidence Act:

“It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.”

This appears to mean that evidence can be led that an accused person pointed out something incriminating (for example, the place where a murder weapon was discovered) even if he had been assaulted and compelled to point the thing out. In *S v Nkomo* 1989 (3) ZLR 117 (S), however, our Supreme Court held that that meaning could not be given to the section since our Constitution outlaws torture:

“It does not seem to me that one can condemn torture while making use of the mute confession (i.e. the pointing-out) resulting from that torture, because the effect is to encourage torture. I conclude therefore that [s 258(2)] of the Criminal Procedure and Evidence Act must be interpreted in such a way as to exclude what I would describe as the mute confession element of the pointing out where the allegation of torture in relation to the pointing out is raised and not satisfactorily rebutted.”<sup>11</sup>

So if an accused person alleges that he was compelled by violence to make an indication, or to point something out, the State cannot lead evidence of the indication or pointing-out unless it shows that it was not in fact induced by violence.

The South African Appellate Division, in the case of *S v Sheehama* 1991 (2) SA 860 (A), interpreted the equivalent provision in the South African Criminal Procedure Act, 1977,<sup>12</sup> as meaning that when evidence of a pointing out is otherwise admissible (i.e. made voluntarily), it will not be inadmissible merely because it forms part of an inadmissible statement. The court said the legislature never intended to authorise evidence of forced pointings-out.

*Sheehama*'s case probably reflects the current law of Zimbabwe more accurately than *Nkomo*'s case, which was decided in 1989 before present Constitution came into force. The previous Constitution did not have a provision equivalent to section 70(3) of the present Constitution, dealing with the admissibility of unlawfully-obtained evidence, and in the light of that section it is arguable that evidence obtained as a result of an unwilling pointing out is obtained illegally and hence is inadmissible. If, on the other hand, the pointing out is done voluntarily then evidence obtained as a result of it is admissible.

---

<sup>9</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 20-4.

<sup>10</sup> Section 50(4)(b) of the Constitution.

<sup>11</sup> *Nkomo*'s case at 131F.

<sup>12</sup> Section 69 of that Act.

## **Failure to mention relevant facts**

According to section 257 of the Criminal Procedure and Evidence Act, if an accused person, when questioned by the police as a suspect in a crime that is under investigation, fails to mention a fact that is relevant to his defence and which he could reasonably have been expected to have mentioned, the court “may draw such inferences from his failure as appear proper”; and the court may treat the accused’s failure to mention the fact as corroborating the other evidence against him. In other words, the fact that an accused does not disclose important aspects of his defence will be held against him. This is a serious limitation on the “right to silence”.

As indicated earlier, this provision is unconstitutional in that it infringes the accused’s pre-trial right to silence.

## **Production of extra-curial statements**

The way in which extra-curial statements of accused persons is given in court depends on whether or not the statements have been confirmed by a magistrate before they are tendered in evidence. Because most extra-curial statements have not been confirmed, we shall deal first with the procedure for producing unconfirmed statements in evidence.

### ***Tendering of unconfirmed extra-curial statements***

The procedure for introducing unconfirmed statements into evidence is through what is called a “trial within a trial”. Where the statement was made to the police and reduced to writing, the police officer who recorded the statement will be called by the prosecutor and asked if the accused made a statement at the relevant time and place, whether the accused was properly warned and cautioned before he made it and if he made it freely and voluntarily and without undue influence being brought to bear on him. At this stage the prosecutor must not ask the police officer what the accused said.

Assuming that the police officer answers the questions affirmatively — i.e. assuming he says that the accused did make a statement and that he did so freely and voluntarily — the prosecutor will say: “I tender the statement in evidence”, and the magistrate or judge will then ask the accused questions to see if he agrees that he did make a statement and, if he did, that he made it freely and voluntarily and without undue influence.

If the accused agrees that he did make the statement freely and voluntarily and without undue influence, the statement will be read out by the police officer and admitted in evidence.

If, on the other hand, the accused denies making the statement, or claims that he made the statement through any form of coercion or undue influence, the statement cannot be admitted in evidence unless the court has found it to be admissible after a “trial within a trial” in which the accused’s allegations of coercion or influence are thoroughly investigated. The onus is on the prosecution throughout to prove that the statement was made voluntarily.

A trial within a trial begins with the court asking the accused to give particulars of his allegations. While he does so, the police officers who are to be witnesses must leave the courtroom. The judge or magistrate should record the accused’s allegations in some detail. The prosecutor then leads evidence from the police officers who were involved in recording the statement, and in doing so should deal with the accused’s allegations in order to rebut or contradict them. The accused is entitled to cross-examine the witnesses. Sometimes the statement itself may be produced as evidence of its voluntariness, if for example it is long and rambling, on the rather dubious basis that such a statement is more likely to be volun-

tary than a short one. This practice has, however, been queried — probably correctly so.<sup>13</sup> After the prosecutor has led evidence for the State in order to establish the voluntariness of the statement, the accused is entitled to lead evidence and the prosecutor can cross-examine him and his witnesses. It should be noted that the cross-examination must be directed at the voluntariness of the statement and cannot go into the question of whether the accused is guilty or innocent of the crime charged against him.

At the conclusion of the trial within a trial the court must decide whether or not the prosecution has proved beyond a reasonable doubt that the statement was made freely and voluntarily and so is admissible. If the court decides that it was, its decision is an interlocutory (i.e. provisional) one and can be altered if evidence given later in the trial shows that the statement may have not have been made voluntarily.

### ***Production in evidence of confirmed extra-curial statements***

#### **Confirmation procedure**

Part VIII of the Criminal Procedure and Evidence Act deals with the confirmation of extra-curial statements, that is to say, bringing an accused person before a magistrate so that the admissibility of any statement made by him, whether orally or in writing, can be investigated and the statement, if found to have been made freely and voluntarily without undue influence, can be “confirmed”. The procedure was introduced to cut down the number of challenges to the admissibility of extra-curial statements and to obviate the delays occasioned by “trials within trials” in which their admissibility was determined.

If a statement is confirmed by a magistrate it is presumed to have been made freely and voluntarily and without undue influence, and at the accused’s subsequent trial the onus rests on him to prove the contrary if he challenges it.

The procedure is not mandatory, and in the majority of cases it is not followed. On the other hand, it has been said that if a statement which has not been confirmed is tendered in the High Court, the court will regard it with some suspicion.<sup>14</sup>

At confirmation proceedings the magistrate’s role is investigatory, and the investigation is supposed to be a thorough one. If the accused admits that he made the statement freely and voluntarily, the magistrate should satisfy himself that the admission is genuine and unequivocal, made by the accused with an understanding of his rights, and that he understands the consequences flowing from confirmation.<sup>15</sup> The magistrate should also ascertain whether the accused’s desire to see his legal practitioner is being frustrated.<sup>16</sup> Finally, before commencing the proceedings, the magistrate must satisfy himself that the accused person is in his sound and sober senses.<sup>17</sup>

The procedure is as follows:<sup>18</sup>

1. The prosecutor produces the statement by handing it to the magistrate and informing him when, where and to whom the statement was made.

---

<sup>13</sup> *S v Donga & Anor* 1993 (2) ZLR 291 (S) at 297, per McNally JA. See also the South African case of *S v Gaba* 1985 (4) SA 734 (A).

<sup>14</sup> *S v Dhlwayo & Anor* 1985 (2) ZLR 101 (S) at 118 D–E.

<sup>15</sup> *S v Munukwa & Ors* 1982 (1) ZLR 30 (S) at 33F–G.

<sup>16</sup> *Attorney-General v Slatter & Ors* 1984 (1) ZLR 306 (S).

<sup>17</sup> Section 113B of the Criminal Procedure and Evidence Act.

<sup>18</sup> It is set out in section 113 of the Criminal Procedure and Evidence Act.

2. The statement is read to the accused and he is informed of when, where and to whom it was allegedly made.
3. The magistrate must ask the accused if he made the statement freely and voluntarily and without being unduly influenced. He must also explain to the accused that if he admits that he so made the statement, it will be confirmed and can be produced at his trial without further proof, and that if he contests its admissibility at the trial he will have to prove that it is inadmissible.
4. If the accused admits that he made the statement freely and voluntarily and without undue influence, the magistrate must confirm it by so endorsing it. The same applies if the accused refuses to answer questions as to whether he made the statement or whether he did so voluntarily: the magistrate must confirm it by endorsing it.<sup>19</sup>
5. If the statement has been translated into English, the magistrate must ensure that the translation represents what the accused actually said.
6. If the accused denies making the statement, or alleges it was not made freely and voluntarily, the magistrate must ask him to give sufficient particulars to inform the State of the facts on which he relies and, where possible, to identify the people who pressured him into making the statement. The magistrate must also tell the accused that if he fails to mention any relevant fact which, in the circumstances, he could reasonably be expected to mention, the court may draw adverse inferences from his failure.
7. If the accused alleges he was subjected to physical ill-treatment, the magistrate must note any injuries he observes and may have the accused medically examined.
8. If the accused says anything that implies that he was offered some form of inducement to make the statement, the magistrate should question him to clarify the position. Confirmation without taking this course would be improper.<sup>20</sup>
9. The magistrate should also look out for suspicious factors which may indicate that undue pressure has been applied, such as a long period between the recording of a statement and the bringing of the accused to court for confirmation proceedings.

The accused is entitled to be legally represented at confirmation proceedings,<sup>21</sup> and members of the public are permitted to be present in the same way that they can attend criminal trials.

After confirmation proceedings, the accused should not be returned to the custody of the police: sending him back to police custody would make a mockery of the protection the procedure is meant to afford.<sup>22</sup>

If the accused is subsequently tried in the magistrates court and the confirmed statement is to be tendered in evidence at that trial, the magistrate who confirmed the statement should not preside over the trial.

---

<sup>19</sup> Section 113(3)(a) of the Criminal Procedure and Evidence Act. In this respect, i.e. endorsing the statement if the accused remains silent, the section violates the accused's right to silence.

<sup>20</sup> *S v Slatter & Ors* 1983 (2) ZLR 144 (S) at 159.

<sup>21</sup> This right was conferred specifically by subsection (6) of section 113 of the Criminal Procedure and Evidence Act, but that subsection was repealed by Act 9 of 2006. Nevertheless, the references to "legal representative" throughout Part VIII indicate that there was no intention to remove the right to legal representation.

<sup>22</sup> *S v Munukwa & Ors* 1982 (1) ZLR 30 (S) at 38E; *S v Slatter & Ors* 1983 (2) ZLR 144 (S) at 160G-H.

## Production of confirmed statement

Once a statement has been confirmed, it is admissible in any court on its production by the prosecutor. According to section 256(2) of the Criminal Procedure and Evidence Act, if the accused wishes to challenge its admissibility the onus is on him to prove, on a balance of probabilities, that it was not made by him or that he did not make it freely and voluntarily without having been unduly influenced.

In other words, an accused person who challenges a confirmed statement faces a reverse onus. In *S v Zuma & Ors* 1995 (2) SA 642 (CC), the South African Constitutional Court held that the equivalent provision in the S.A. Criminal Procedure Act violated the accused's right to a fair trial. The reasoning in *Zuma's* case is compelling:

“[T]he common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights in turn are the necessary reinforcement of Viscount Sankey's ‘golden thread’ — that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt (*Woolmington's* case *supra*<sup>23</sup>). Reverse the burden of proof and all these rights are seriously compromised and undermined. I therefore consider that the common-law rule on the burden of proof ... forms part of the right to a fair trial.”<sup>24</sup>

## Challenge to validity of confirmation proceedings

It is open to an accused person at his trial to challenge the validity of confirmation proceedings (instead of, or as well as, challenging the admissibility of the statement). He may rely on factors such as denial of legal representation, or threats by the police that any resistance to confirmation would lead to further torture. If the accused raises a potentially sustainable challenge to the confirmation of his statement, the court must determine the validity of the challenge as a separate preliminary issue before the statement is produced in court. In such a case the onus is on the State to prove the validity of the confirmation proceedings beyond a reasonable doubt.<sup>25</sup>

The conduct of confirmation proceedings may be proved by producing the record of the proceedings; the record may be handed in by any person.<sup>26</sup>

## Deletion of prejudicial matter from extra-curial statements

Sometimes accused persons mention things in their statements which would be inadmissible and prejudicial to them if revealed at their trial. For example, an accused person may admit that he has previous convictions, or that he has committed some other crime.

In terms of section 256(3) of the Criminal Procedure and Evidence Act, a prosecutor is allowed to alter an accused person's written statement by deleting such matters from it. The accused must be given notice of the prosecutor's intention, and this is done by serving on him a copy of the statement from which the matters have been deleted, and giving him five days within which to object to the deletion. If the accused does object to the deletion, then the original statement is admissible at his trial despite the prejudicial material.

Two points should be noted. First, there is no provision in section 256(3) for the accused person to waive the requirement of five days' notice. This suggests that he cannot do so,

---

<sup>23</sup> *Woolmington v DPP* [1935] AC 462 (HL).

<sup>24</sup> At page 659G-I.

<sup>25</sup> *S v Woods & Ors* S-60-93, quoted in *S v Woods & Ors* 1993 (2) ZLR 258 (S) at 268.

<sup>26</sup> Section 115B of the Criminal Procedure and Evidence Act.

and that it is not competent for a prosecutor to alter the statement in court and obtain the accused person's consent to the deletion.<sup>27</sup> Secondly, it would not be enough simply to serve a copy of the amended statement on the accused. He should be informed what alterations are proposed to be made to the statement and invited to object if he so wishes. He should also be told of the consequences of any objection or failure to object to the proposed deletion.

## **Objections to our law vis-à-vis extra-curial statements**

The procedure regarding extra-curial statements is open to several objections.

### **It encourages suspects to make statements to the Police**

The police can detain suspects for up to 48 hours. During that time the detainee has all "non-essential wearing apparel" removed and is kept in police cells. Sometimes the detainee is left there for a day or more before a warned and cautioned statement is recorded. Such treatment gives the police, at the very least, a significant psychological advantage. In such circumstances, can it really be said that any statement recorded from a detained suspect is truly voluntary?

### **The statement may not be reliable**

A suspect may think that the easiest way to escape questioning and detention is to lie and construct an alibi. If, at his subsequent trial, the alibi is destroyed, his credibility will suffer.

The police may themselves draft a statement and pressurise a suspect to sign it, leading to the police being able to slip in terms (e.g. "intent") which have a particular legal significance of which the suspect is unaware. Sometimes the police may insert such terms into a statement inadvertently, through misunderstanding what the suspect is trying to say. In either event a statement recorded by the police may not reflect what the suspect really means.

If the police try to extract a statement from an accused person by using methods that would be impermissible if they were employed in open court, this may not become apparent at the subsequent trial. The rules of procedure are there to ensure fairness, and they should not be capable of evasion in this way.

### **The State can tailor its case to meet the defence case**

In civil proceedings, the defendant sees the plaintiff's summons or declaration before setting out his defence, and can ask for further particulars if any of its details are obscure. The defendant can therefore ascertain the plaintiff's full case before revealing his own. In criminal proceedings, in contrast, the police do not have to reveal any evidence that they have against the accused before asking him to give them his side of the story.

Note that from the Judges' Rules, the purpose of police questioning is theoretically to clear up ambiguities and establish the facts.<sup>28</sup> In fact, it is often to persuade the suspect to talk.

### **Reliance on confessions leads to skimmed investigations**

In many cases where the prosecution relies on a confession by the accused person, there is additional evidence available to prove the accused person's guilt. Through relying on a

---

<sup>27</sup> See Reid Rowland *Criminal Procedure in Zimbabwe* p. 20-13.

<sup>28</sup> Rule (2) of the South African Judges' Rules states: "Questions, the sole purpose of which is that the answers may afford evidence against the person suspected, should not be put."

confession the police often ignore this other evidence, so the only evidence presented to the prosecutor in the police docket is evidence of the commission of the crime (the complainant's statement) and the accused's confession. If the confession is ruled inadmissible, the prosecution fails.

**The trial court may read an accused's statement even if it is subsequently ruled inadmissible**

When an accused person's statement is tendered in evidence at his trial, the presiding judge or magistrate will often be able to read the statement before ruling on its admissibility. So even if the statement is subsequently ruled to be inadmissible, the judge or magistrate will know what the accused told the police and, being human, he may believe that the statement was true even if the accused was forced to make it.

**The police can get statements from accused persons who are unaware of their rights**

Most Zimbabweans are ignorant of their rights. And for cultural and historical reasons, they often regard the police as all-powerful. Hence they are not likely to object to improper conduct on the part of the police.

Although the police have to advise accused persons of their right to engage a lawyer,<sup>29</sup> few Zimbabweans can afford to engage legal practitioners to advise them. Even those who can afford legal representation cannot always get their lawyer to drop everything and rush down to the police station. In any event, legal advice given to accused persons at a police station is not always satisfactory. Inexperienced lawyers sent to represent a client who has been arrested may not be as challenging as they ought to be.<sup>30</sup>

Commonly, an accused person will make a statement to the police, but at his subsequent trial will deny making it or, more often, will deny making it freely and voluntarily. This may be because at his trial he realises for the first time that he was not obliged to say anything to the police and tries to evade the implications of his statement by falsely alleging that he was assaulted or threatened or otherwise forced into making it. If the accused had been given proper legal advice at the outset, he would probably not have made the statement at all. But without that advice or adequate knowledge, he falls back on extravagant allegations of assault which are easily proved to be false and which may distract the court's attention from the fact that other undue influences may have been brought to bear on the accused (e.g., he may have been promised a more lenient sentence, or release on bail, if he admits the crime).

### **Conviction of accused person on proof of confession**

Under section 273 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], an accused person who has pleaded not guilty can be convicted if the prosecution proves that he confessed freely and voluntarily to the crime charged, and that the crime charged was actually committed.

---

<sup>29</sup> Section 50(1)(b) of the Constitution and section 41A of the Criminal Procedure and Evidence Act.

<sup>30</sup> Cf *S v Woods & Ors* 1993 (2) ZLR 258 (S) at 273.

## 14. WITNESSES

### Securing the presence of witnesses

Witnesses are brought to court in two ways: by warning them to appear, and by serving them with subpoenas.

#### **Warning**

The Police frequently warn (i.e. order) witnesses to appear in court on a particular date and at a particular time. The warning may be given orally or in writing. A warning by the police has no legal effect, but is a convenient way of getting witnesses to court; on the other hand, a witness cannot be punished for failing to appear in court in response to such a warning.<sup>1</sup>

Similarly, courts occasionally warn (i.e. order) people who are in court to remain in attendance as witnesses or to attend at a future date. Again there is no legal basis for such a warning, and if the person refuses to remain in attendance, or doesn't attend court at the future date, it is doubtful if the court can impose any sanction on him.

#### **Subpoena**

A subpoena<sup>2</sup> is a document requiring a person to attend court as a witness on a specified date and at a specified time. It may also require the person to produce to the court any books, papers or documents (in which case it is called a subpoena *duces tecum*<sup>3</sup>).

A subpoena may be issued at the instance of either the prosecutor or the accused. The registrar, assistant registrar or clerk of the court where the trial is to be held must subpoena witnesses for the defence on the application of the accused if the accused satisfies him that he cannot pay the necessary costs and fees, and that the witnesses are necessary and material for his defence.<sup>4</sup> If the registrar or clerk refuses to issue a subpoena for the defence, the accused can have the application referred to a judge or magistrate, who may grant or refuse it or defer a decision on it until evidence has been led at the trial.<sup>5</sup>

Subpoenas are served, usually by police officers, either personally or by handing a copy to a person who is apparently at least 16 years old and who apparently lives or is employed at the witness's residence or place of business.<sup>6</sup>

When a witness attends court in obedience to a subpoena, he must remain in attendance until excused by the court. If he fails to attend or to remain in attendance he may be arrested under a warrant issued by the judge or magistrate, who may have him detained or may release him on a recognizance with or without sureties.<sup>7</sup> In addition, the judge or magistrate may inquire into his failure to obey the subpoena and may sentence him to a fine of up to

---

<sup>1</sup> See Reid Rowland *Criminal Procedure in Zimbabwe* p. 8–2.

<sup>2</sup> From the Latin *sub poena*, meaning “under penalty”.

<sup>3</sup> In Latin, “under penalty bring with you”.

<sup>4</sup> Section 229(3) of the Criminal Procedure and Evidence Act.

<sup>5</sup> Section 229(4) of the Criminal Procedure and Evidence Act.

<sup>6</sup> Sections 9 and 10 of the High Court (Criminal Procedure) Rules, 1964 (SI 452 of 1964).

<sup>7</sup> Section 237 of the Criminal Procedure and Evidence Act.

level 3<sup>8</sup> and/or imprisonment for up to three months<sup>9</sup>. Before imposing sentence, however, the judge or magistrate should afford the witness an opportunity to explain himself and, if necessary, to obtain legal representation.<sup>10</sup>

### **Exclusion of witnesses from courtroom**

The court may, at any time during a trial, order that anyone who is to be called as a witness, apart from the accused, must leave the court and remain outside until called. The court may also order that a witness who has given evidence must remain in court.<sup>11</sup> It is accepted practice that witnesses should remain outside the court until they are called to give evidence; this prevents them tailoring their testimony to fit in with evidence that has already been given. Likewise, keeping witnesses who have testified in the courtroom will prevent collusion between them and witnesses who have yet to testify.

### **Hostile witnesses**

Sometimes the prosecution has to call witnesses who are reluctant to give evidence against the accused: perhaps because they are related to the accused, or because they are his friends or employees, or for some other reason. In such cases it may be difficult for the prosecutor to extract evidence from the witnesses without cross-examining them, and so he or she may ask the court to declare them hostile.

Not all witnesses who are related to or friendly with the accused are hostile, and before a court will declare a witness hostile the witness must show an unwillingness to tell the whole truth. As stated by De Villiers JP in *Meyer's Trustee v Malan* 1911 TPD 559 at 561<sup>12</sup>:

“The court must come to a decision as to whether the witness is adverse, i.e. hostile, from his demeanour in the box, his position towards or relationship to the party calling him, and from the general circumstances of the case.”

The court has a discretion whether or not to declare a witness hostile, and the court's discretion will not lightly be altered on review or appeal.<sup>13</sup>

Once a witness has been declared hostile, he or she may be cross-examined by the prosecutor.

What is said above about prosecution witnesses who prove hostile applies equally to defence witnesses who prove hostile to the accused.

### **Discrediting or impeaching witnesses**

If a prosecution witness gives evidence that is inconsistent with a previous statement he or she made to the police the prosecutor may be obliged to disclose the fact to the court or the defence lawyer (the circumstances in which the prosecutor is obliged to do so are set out earlier). If the discrepancy is not one which the prosecutor is obliged to disclose (i.e. if it is

---

<sup>8</sup> A fine of level 3 is currently fixed at \$60 (First Schedule to the Criminal Law Code, as substituted by the Finance Act, 2019 (No. 1 of 2019).

<sup>9</sup> Section 237(3) of the Criminal Procedure and Evidence Act.

<sup>10</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 8–4.

<sup>11</sup> Section 194(3) of the Criminal Procedure and Evidence Act.

<sup>12</sup> Cited in Hoffman & Zeffertt *The S.A. Law of Evidence* 4th ed p 455.

<sup>13</sup> *Steenkamp v Street* 1923 TPD 208, cited in Hoffmann & Zeffertt *The S.A. Law of Evidence* 4th ed p. 455.

not material) or if the prosecutor wants to discredit the witnesses' evidence completely so that the court will not rely on it, he or she may impeach the witness.

This involves confronting the witness with his previous statement. The court must first be informed of the discrepancy, then the witness must be asked if he made the statement; he must be given sufficient particulars about when and where the statement was made to allow him to identify it. If the witness denies making it, then the police officer who recorded it should be called, plus any interpreter. If the statement is proved, or the witness admits making it, the witness must be asked to explain the discrepancy.<sup>14</sup> This is the course to follow if the prosecutor does not want the witness's evidence to be used.

The fact that a witness has been proved to have made previous inconsistent statement does not necessarily mean that his or her evidence must be totally disregarded. The witness's explanation for the inconsistency may be acceptable, and the inconsistency may not affect the whole of the witness's evidence. But if the inconsistency applies to the whole of his or her evidence it will discredit the evidence completely.

What has been said about impeaching prosecution witnesses applies equally to the impeachment of defence witnesses if they give evidence inconsistent with previous statements.

### **Protection of vulnerable witnesses**

Under Part XIVA of the Criminal Procedure and Evidence Act [*Chapter 9:07*], vulnerable witnesses — i.e. persons who are likely to suffer substantial emotional stress from giving evidence, or are likely to be intimidated — are afforded some relief from the stresses of giving their evidence in open court. The most usual categories of vulnerable witnesses are women and children who are victims of crime.

#### ***Measures that can be taken to protect vulnerable witnesses***

If a court considers that a witness is vulnerable and needs protection, the court can do any of the following, either on its own volition or on application of the prosecutor or accused:<sup>15</sup>

- appoint an intermediary or a support person for the witness;
- direct that the witness should give evidence from a place, in or away from the accused's presence, where the witness is likely to suffer less stress or intimidation (but if the witness is to give evidence away from the accused's presence, he and his lawyer must be able to see and hear the person giving evidence, whether through a screen or closed-circuit television or some other means);
- adjourn the proceedings to another place, where the court considers he or she will be less likely to be subjected to stress or intimidation;
- make an order excluding the public from the proceedings.

Note that these measures do not include allowing the witness to give evidence before the trial, or training or coaching the witness in how to give his or her evidence.<sup>16</sup> Nor do the measures cover protecting witnesses after they have given evidence.

---

<sup>14</sup> *S v Mazhambe & Ors* 1997 (2) ZLR 587 (H). The procedure is set out in section 316 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>15</sup> Section 319B of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>16</sup> As to the dangers of training and coaching witnesses, see the English case of *R v Momodou & Anor* [2005] 2 All ER 571 (CA) cited in *S v Le Roux* (A746/10) [2011] ZAWCHC 367 (1 September 2011).

Before taking any such action the court can interview the witness to assess his or her vulnerability, and must give the prosecution and defence an opportunity to make representations.<sup>17</sup>

Persons who are appointed as intermediaries for vulnerable witnesses must be either court interpreters or former court interpreters, or persons who have undergone approved training. Support persons will be parents or guardians of the witness, or other persons whom the court considers can give the witness moral support.<sup>18</sup> Where an intermediary has been appointed all questions must be directed to the witness through the intermediary (except for questions put by the court itself) and the witness's answers may be relayed to the court through the intermediary.<sup>19</sup>

---

<sup>17</sup> Sections 319C(2) and 319D of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>18</sup> Section 319F of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>19</sup> Section 319G of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

## 15. PRELIMINARIES TO THE TRIAL

### Date of trial

#### **High Court**

When a person is to be tried in the High Court the trial date is determined by the Prosecutor-General or his representatives, though the court, on good cause shown by the accused, may order that the trial should be held on an earlier date.<sup>1</sup> The court may also postpone the trial. Hence, the Prosecutor-General's representatives must be reasonable in fixing a trial date, and should consult the accused's legal practitioner when doing so.<sup>2</sup> Note that the trial date fixed by the Prosecutor-General must be within six months from the date of the accused's committal for trial (excluding any time during which the accused is not available to stand trial); if it is later, the case against him must be dismissed.<sup>3</sup>

#### **Magistrates court**

An accused must be brought up for trial on "the next possible court day",<sup>4</sup> but his trial may not take place on that date; it may be postponed. The actual date of trial is fixed by the public prosecutor, and as with the High Court it is desirable that when fixing a date the prosecutor should consult the accused's legal practitioner, if any.

#### **Postponement or adjournment of trial**

A court has power to postpone and to further postpone any trial pending before it, if the court considers it necessary and expedient, and to impose terms on any such postponement.<sup>5</sup> In the case of a magistrates court, the trial cannot be postponed for more than 14 days without the accused person's consent.<sup>6</sup>

Once a trial has started, it may be adjourned whether or not any evidence has been led, but once again a magistrate may not adjourn a trial for more than 14 days at a time without the accused's consent.<sup>7</sup>

The court's power of adjournment is of course limited by the constitutional provision guaranteeing accused persons the right to a trial within a reasonable time.<sup>8</sup>

### Bringing the accused to trial in the High Court

In terms of section 65 of the Criminal Procedure and Evidence Act, no one may be tried in the High Court at the public instance unless he has been committed for trial there by a magistrate. So once the Prosecutor-General's representative has fixed a date for the trial, he must cause the accused person to be committed for trial there. This is done by sending a

---

<sup>1</sup> Section 160(1) of the Criminal Procedure and Evidence Act.

<sup>2</sup> *S v Paweni & Anor* 1984 (2) ZLR 16 (H) at 27E.

<sup>3</sup> Section 160(2) of the Criminal Procedure and Evidence Act.

<sup>4</sup> Section 163 of the Criminal Procedure and Evidence Act

<sup>5</sup> Section 165 of the Criminal Procedure and Evidence Act.

<sup>6</sup> Section 165 (proviso) of the Criminal Procedure and Evidence Act.

<sup>7</sup> Section 166 of the Criminal Procedure and Evidence Act.

<sup>8</sup> Section 69(1) of the Constitution. This was dealt with earlier in these lectures under Arrest and Remand.

notice to the magistrate stating that he has decided to indict the accused for trial in the High Court and informing the magistrate of the charge against the accused.<sup>9</sup> The magistrate will then have the accused brought before him, commit him for trial in the High Court, order his further detention until the trial, and cause the following papers to be served on him (the papers will have been prepared by the Prosecutor-General's representative and sent to the magistrate with the notice):<sup>10</sup>

- the notice of trial;
- the indictment;
- a list of witnesses the State intends to call at the trial, together with a summary of the evidence which each witness is expected to give, sufficient to inform the accused of all the material facts on which the State relies;
- a notice requesting the accused to give an outline of his defence, and a list of any witnesses he intends to call, together with a summary of the evidence which each witness is expected to give, sufficient to inform the prosecution of all the material facts on which the accused relies.

If the accused is to be legally represented at his trial (and most accused persons are in the High Court), his legal practitioner must, at least three days before the trial, lodge his defence outline, together with the list of witnesses and the summary of their evidence, with the Registrar of the High Court and must deliver a copy to the Prosecutor-General.<sup>11</sup> If the accused is not to be legally represented at his trial, the Prosecutor-General can have him brought before a magistrate who must:

- ask the accused if he understands the Prosecutor-General's documents that were served on him. If the accused doesn't, the magistrate must explain them to him;
- inform the accused of his right to remain silent and of the consequences of doing so, in particular that if he fails to mention anything which, in the circumstances, he could reasonably be expected to have mentioned, adverse inferences may be drawn from that failure and the failure may be regarded as corroborating the State's evidence against him; and
- request the accused to give his defence outline, the names of any witnesses he intends to call and a summary of their evidence.<sup>12</sup>

So whether the accused is legally represented or not, he is induced to provide the State with an outline of his defence before the trial starts.

There is no harm in the accused being asked to reveal his defence, so long as he is told that he does not have to do so — and section 66(10)(b) of the Criminal Procedure and Evidence Act requires the magistrate to do this. What is unconstitutional is the fact that if an accused person fails to give an outline of his defence, or fails to mention a material fact, adverse inferences can be drawn and the failure can be regarded as corroborating the State's evidence. The accused is penalised for exercising his constitutional right to silence.

---

<sup>9</sup> Section 66(1) of the Criminal Procedure and Evidence Act.

<sup>10</sup> Section 66(2) and (6) of the Criminal Procedure and Evidence Act.

<sup>11</sup> Section 66(8) of the Criminal Procedure and Evidence Act.

<sup>12</sup> Section 66(10) of the Criminal Procedure and Evidence Act.

## **16. OUTLINE OF TRIAL PROCEDURE FROM PLEA TO SENTENCE**

### **Introduction**

Each stage of a criminal trial is governed by rules, sometimes quite complex ones. The rules are easier to understand if we have a broad picture in our minds of what usually happens in criminal trials from the time that the accused person pleads to the charge until he is either acquitted or found guilty and sentenced. So what follows is an outline of what happens in most trials in the High Court and in magistrates courts. The rules governing each stage of a trial, and what can happen at each of those stages, will be dealt with in more detail later in these notes.

### **Explanation of Accused Person's Rights**

Before an accused person is called on to plead in a magistrates court, the magistrate must inform him of his right to be represented by a lawyer – this does not apply, of course, if the accused is legally represented.

### **Arraignment**

This is the stage when the accused person is called on to plead to the charge, which is set out in an indictment (in the High Court) or in a summons or charge sheet (in a magistrates court). Although the accused can put forward special pleas such as challenging the jurisdiction of the court or that he has already been tried for the crime, he will normally plead either guilty or not guilty.

#### ***Plea of guilty***

If the accused person pleads guilty to the charge, he is admitting that he committed the crime to which he is pleading guilty. He may plead guilty to all charges, or to some of them, or to a lesser crime. If he pleads guilty to a lesser crime the court will record a plea of not guilty unless the prosecutor indicates that he or she accepts the plea to the lesser crime.

The High Court can convict an accused person who has pleaded guilty without hearing any evidence, though in practice if the accused pleads guilty to murder the court will record a plea of not guilty and require the prosecution to lead evidence.

If an accused person pleads guilty in a magistrates court the court can convict him without hearing evidence if he is charged with a petty crime (i.e. one where a fine of level 3 or less is imposed). If however the crime is more serious the court can convict an accused person without hearing evidence only if the court is satisfied that he fully understands the charge and the essential elements of the crime, and that by pleading guilty he is admitting all those elements and the acts and omissions set out in the charge. Once the court is satisfied on that score, it can convict him without any evidence and can impose any appropriate sentence on him.

#### ***Plea of not guilty***

By pleading not guilty the accused person is challenging the prosecution to prove beyond a reasonable doubt that he or she committed the crime charged. So when an accused person pleads not guilty, there needs to be a trial to determine his guilt.

## Outline of State and Defence Cases

### **High Court**

In the High Court both parties – prosecution and defence – have provided the court and each other with outlines of their respective cases before the trial begins. When an accused person is committed for trial in the High Court, he must be given a written outline of the State case summarising the evidence which each State witness is expected to give. And before the trial is held, his legal practitioner must provide the prosecution with an outline of his defence, summarising the evidence which each defence witness is expected to give. If he fails to do so, the court may draw adverse inferences from the failure – that is, the court may infer that his failure to provide the outline indicates he has something to hide.

So before the trial starts each party knows the case the other party will try to establish. Nonetheless, before leading any evidence the prosecutor will usually give the court a brief explanation of what the case is about.

### **Magistrates court**

After an accused person has pleaded not guilty in a magistrates court, the prosecutor must provide a written outline of the nature of the State case and the material facts he or she will rely on. The accused person is then asked to give an outline of his defence and the material facts on which he will rely. If he fails to do so, the court may draw adverse inferences from the failure.

## The State Case

After the accused has pleaded not guilty and – in a magistrates court – the prosecutor and the accused have outlined their cases, the prosecutor must lead the State’s evidence. This is done by getting the State witnesses to come to the witness stand, one by one, and be sworn and give their evidence orally. The prosecutor guides them through their evidence by asking them questions, though the questions must not be “leading”. When the prosecutor has guided a witness through his or her evidence, the accused or his legal practitioner is allowed to cross-examine the witness – that is, ask the witness questions in order to discredit the witness’s evidence or to bring out points in favour of the defence. After the witness has been cross-examined the prosecutor is allowed to re-examine the witness in order to deal with points arising from the cross-examination.

If the prosecutor wants to produce evidence of an extra-curial statement made by the accused, he can simply hand in the statement if it has been confirmed by a magistrate. If it has not been confirmed, then the court must embark on a “trial within a trial”, i.e. an enquiry to determine the circumstances in which the accused made the statement. Only if the prosecution proves that the accused made it freely and voluntarily will it be admitted in evidence.

When all the State witnesses have given evidence the prosecutor must close the State case.

## Discharge at End of State Case

When the State has closed its case the judge or magistrate must decide whether the State’s evidence is sufficiently convincing to establish a *prima facie* case, i.e. a case that requires a response from the accused. If it is not, the judicial officer must discharge the accused by finding him not guilty. If there is a *prima facie* case against the accused, however, it is the turn of the accused or his legal practitioner to present the defence case.

## **Defence Case**

The judicial officer must tell the accused, if he is not legally represented, that if he is going to give evidence he must do so before any of his witnesses give theirs. The accused must also be told that even if he does not give evidence he may be questioned by the prosecutor and the court.

Before leading any evidence the accused or his legal practitioner may address the court, outlining the evidence he is going to lead.

The accused (if he gives evidence) and his witnesses come to the witness stand one by one to give their evidence orally. They are all liable to be cross-examined by the prosecutor and, when they have been cross-examined, to be re-examined by the accused or his legal practitioner.

When all the accused's witnesses have given evidence, the defence case is closed.

## **Verdict**

After the defence case is closed, the judicial officer can reach a verdict. Before doing so, however, the prosecutor must be given an opportunity to address the court, summing up the case against the accused, and then the accused or his legal practitioner must be allowed to address the court. Having heard both parties the judge or magistrate can then deliver judgment and verdict, i.e. the decision on whether the accused is found guilty or not guilty.

If the accused is found not guilty he is discharged and released from custody. If however he is found guilty, the judge or magistrate has to consider what sentence to impose.

## **Sentence**

Before imposing sentence the judicial officer must give both parties an opportunity to address the court and lead evidence in regard to an appropriate sentence. The prosecutor normally starts, and can lead evidence as to the accused person's previous convictions and deal with any other factor that relates to sentence. The accused or his legal practitioner must also be allowed to address and lead evidence in mitigation of sentence.

Having done that, the judicial officer is in a position to impose whatever sentence is appropriate and lawful.

## 17. PLEAS

### Arraignment

Arraignment is the putting of charges to the accused person so that he can plead to them. If two or more accused are being tried together, each one must be called upon personally to plead to the charges.

It is not necessary for the charge to be read to the accused if the judge or magistrate is satisfied that the accused has read it and understands it. Nor need the charge be read verbatim to the accused, so long as the judge or magistrate satisfies himself that the accused knows exactly what he is required to plead to.<sup>1</sup>

The accused must make his plea freely and voluntarily and without having been influenced to do so by assaults or threats of violence. If the accused pleads guilty because he has been threatened with a more severe sentence should he plead not guilty, it is not a proper plea.<sup>2</sup>

When a charge is put to the accused, he is required to plead, or answer, to it “instantly”.<sup>3</sup> He must plead to it personally, and his legal practitioner should not tender a plea on his behalf unless it is confirmed by the accused.<sup>4</sup> If the accused is a company or other corporate body, the director or employee representing the company or corporate body will plead on the accused’s behalf — though a plea of guilty will not be valid unless the company or corporate body has authorised it.<sup>5</sup>

If the accused person refuses to plead at all, a plea of not guilty may be entered.<sup>6</sup>

#### **Objections to charge**

The accused may refuse to plead to a charge on the ground that he has not been served with a copy of the indictment or summons.<sup>7</sup> A conviction will be set aside if the accused is arraigned on a serious charge without being given sufficient notice to prepare his defence or seek legal representation – though this will not apply if the trial is then adjourned to give the accused time to do so.<sup>8</sup>

#### **Exceptions and motions to quash**

Objections to a charge (apart from the example noted above) take the form of exceptions or motions to quash.

*An exception* is an objection to the charge, usually on the ground that it discloses no crime.

*A motion to quash* is raised when the charge lacks particularity so as to prejudice or embarrass the accused in his defence.

---

<sup>1</sup> *S v Gwebu, S v Xaba* 1968 (4) SA 783 (T).

<sup>2</sup> Lansdown & Campbell S.A. *Criminal Law & Procedure* vol 5 p. 401.

<sup>3</sup> Section 168 of the Criminal Procedure and Evidence Act.

<sup>4</sup> *S v Nyandoro* 1987 (2) ZLR 66 (S).

<sup>5</sup> Section 385(3) of the Criminal Procedure and Evidence Act.

<sup>6</sup> Section 182 of the Criminal Procedure and Evidence Act.

<sup>7</sup> Section 168 of the Criminal Procedure and Evidence Act.

<sup>8</sup> *S v Masilela* 1990 (2) SACR 116 (T), cited in Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 238.

Motions to quash are made only against indictments in the High Court; all objections to a charge in a magistrates court are brought by way of exception. An accused can except to the charge and plead to it at the same time, and in that event the court has a discretion whether to dispose of the exception before evidence is led or after.<sup>9</sup> But generally, objections to a charge or indictment must be taken before the accused person has pleaded, not afterwards,<sup>10</sup> and if he has already pleaded, he cannot object to the charge and the trial must proceed — though he can raise the objection at the end of the trial as a reason for acquittal.<sup>11</sup>

### **Notice to be given before objecting to charge, and for certain pleas**

Before excepting to a charge or applying to have the charge quashed, and before tendering any plea other than guilty or not guilty, the accused must give reasonable notice to the Prosecutor-General or his representative, or to the public prosecutor if the trial is in a magistrates court.<sup>12</sup> The Prosecutor-General or the prosecutor may however waive notice, and the court may dispense with the requirement of notice on good cause shown.

## **Particular pleas**

The various pleas that may be tendered by an accused person are set out in section 180(2) of the Criminal Procedure and Evidence Act. They are as follows:

### **Not guilty**

By pleading not guilty, an accused person is regarded as having demanded the trial of the questions involved, and that the prosecution should be put to the proof of its allegations against him.<sup>13</sup> Note that it is not necessarily a statement by the accused person that he did not commit the crime; it is really a challenge to the prosecution to prove its case if it can.

### **Guilty**

A plea of guilty to the charge is an admission of all the material facts stated in the charge. After a plea of guilty there is no issue between him and the State.

The accused may, however, tender a plea of guilty to a lesser crime than the one charged: for example, an accused charged with murder may tender a plea of guilty to culpable homicide.<sup>14</sup> The prosecutor (not the court) then has a discretion whether or not to accept the lesser plea.<sup>15</sup> The same applies where the accused pleads guilty to an alternative charge. If the prosecutor accepts the plea it is not competent for the court to convict the accused of the more serious crime that was charged.<sup>16</sup> If, on the other hand, the prosecutor does not accept it, then a plea of not guilty is entered and the trial goes ahead as if the accused had pleaded not guilty — but the plea is regarded as an admission by the accused of the facts that go to make up the lesser crime. For example, if the accused is charged with murder and tenders a

---

<sup>9</sup> Section 180(4) of the Criminal Procedure and Evidence Act.

<sup>10</sup> Section 170 of the Criminal Procedure and Evidence Act.

<sup>11</sup> *David & Ors v Van Niekerk NO & Anor* 1958 (3) SA 82 (T).

<sup>12</sup> Section 179 of the Criminal Procedure and Evidence Act.

<sup>13</sup> Lansdown & Campbell S.A. *Criminal Law & Procedure* vol 5 p. 425.

<sup>14</sup> Section 180(2)(a) of the Criminal Procedure and Evidence Act.

<sup>15</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 16-17. See also Lansdown & Campbell S.A. *Criminal Procedure and Evidence* vol 5 p. 418-9 for a discussion of plea bargaining.

<sup>16</sup> *R v Machingura* 1944 SR 194.

plea to culpable homicide, which plea is not accepted by the prosecutor, then at the subsequent trial the accused will be regarded as having admitted that he unlawfully caused the death of the deceased person.<sup>17</sup>

Note that if, after pleading not guilty, an accused person during the trial tenders a plea of guilty to a lesser crime the prosecutor cannot accept the plea except with the leave of the court since once he has pleaded the case is in the hands of the court.<sup>18</sup>

## Procedure on plea of guilty

### *High Court*

In the High Court, it is competent for the court to convict an accused person on his plea of guilty without hearing any evidence.<sup>19</sup> This does not, however, apply to a charge of murder. In such a case, a plea of not guilty is entered as a matter of course and the trial proceeds as if that had been the accused person's plea, though any admission he may have made with his plea is taken into account.<sup>20</sup> Oral evidence must be led, and it is not sufficient for the trial to be based solely on admissions of fact.<sup>21</sup>

### *Magistrates court*

In a magistrates court, if the accused person pleads guilty to the crime charged, or if he pleads guilty to any other crime of which he could be convicted on the charge sheet and the prosecutor accepts the plea of guilty to that other crime, the procedure to be followed depends on whether the crime to which the accused has pleaded is a petty one or is more serious. This procedure is set out in section 271(2) of the Criminal Procedure and Evidence Act.

*Petty Crimes:* If the court considers that the crime merits nothing more than a fine of level 3,<sup>22</sup> it may adopt the procedure set out in section 271(2)(a) of the Criminal Procedure and Evidence Act and without further ado convict the accused of the crime to which he has pleaded guilty and impose a fine of level 3 or less. The court may also impose any additional punishment that is required by law — for example, a prohibition from driving, in the case of a driving crime, or forfeiture of an article used in the commission of the crime — but it may not impose a sentence of imprisonment, even if it is wholly suspended.<sup>23</sup>

This procedure should be adopted only for minor crimes, and the prosecutor should assist the court in deciding whether the crime is a minor one. If the prosecutor, in the light of the facts of the case, considers the crime is not minor, he should outline the facts and request the court to proceed in terms of section 271(2)(b) of the Criminal Procedure and Evidence Act; the court must accede to this request. (Note, however, that the court is not obliged to follow the procedure under section 271(2)(a) merely because the prosecutor recommends it; the discretion to do so is vested in the court, not the prosecutor.)

---

<sup>17</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 16-18.

<sup>18</sup> Lansdown & Campbell *S.A. Criminal Law & Procedure* vol 5 pp. 419 and 425.

<sup>19</sup> Section 271(1) of the Criminal Procedure and Evidence Act.

<sup>20</sup> *S v Nangani* 1982 (1) ZLR 150 (S); *S v Dehwe* 1987 (2) ZLR 231 (S).

<sup>21</sup> *S v Nzuza* 1963 (3) SA 631 (A).

<sup>22</sup> A fine of level 3 is currently fixed at \$60 (First Schedule to the Criminal Law Code, as substituted by the Finance Act, 2019 (No. 1 of 2019)).

<sup>23</sup> *S v Honde & Ors* HB-27-91.

*More serious crimes:* If the court considers the crime merits a more severe sentence, then the court must follow the procedure laid down in section 271(2)(b) of the Criminal Procedure and Evidence Act:

1. *Where the accused person is not legally represented:*

- The magistrate must carefully explain the charge and the essential elements of the crime to the accused, and if the acts or omissions on which the charge is based are not readily apparent, the magistrate must get the prosecutor to state what they are. Failure to give this explanation will invalidate the conviction.<sup>24</sup>

In particular, the magistrate should deal with the following aspects in his explanation:

- Specific intent, where the crime requires a specific intent.
- Knowledge, where the crime requires knowledge of a particular fact or circumstance (e.g. receiving stolen property knowing it to have been stolen).
- Realisation of real risk or possibility (constructive intention): it may be necessary to question the accused to establish whether he must have realised that there was a real risk or possibility that his conduct would have a particular result.
- Particulars of negligence: where the accused has pleaded guilty to a crime involving negligence, the particulars must be put to him.<sup>25</sup>
- Possession: this is a difficult concept, because sometimes the crime requires more than mere *detentio* (i.e. physical possession). In such a case, the magistrate should explain what additional element (e.g. knowledge) is required.<sup>26</sup>
- Unlawfulness: sometimes this concept needs to be explained, for example in cases of theft by finding, where the accused may have believed that the property he found was *res derelicta* and that he was entitled to keep it.<sup>27</sup> In rape cases, the questioning must establish that the accused is admitting not merely sexual intercourse, but also that it was not consensual. If the statute under which the accused is charged specifies that the crime is committed if the act is done “without lawful excuse” or “without reasonable excuse”, the magistrate must ascertain that the accused admits that he had no such excuse.
- Special defences: if there are any special defences to a charge, these should be explained to the accused (e.g. it is a defence to the crime of sexual intercourse with a young person that the accused believed the young person was of or over the age of 16).
- Where the accused is liable to a mandatory minimum sentence unless special circumstances are shown, these should be pointed out to the accused and the meaning of “special circumstances” explained.<sup>28</sup>
- Where there are competent verdicts on which the accused may be convicted, the court should advise the accused that he might be convicted of such a crime.<sup>29</sup>

---

<sup>24</sup> *S v Sibanda* 1989 (2) ZLR 329 (S).

<sup>25</sup> *S v Matimba* 1989 (3) ZLR 173 (S).

<sup>26</sup> *S v Dube & Anor* 1988 (2) ZLR 385 (S).

<sup>27</sup> *S v Bizwick* 1987 (2) ZLR 83 (S), where the accused found a bicycle which he believed had been abandoned.

<sup>28</sup> *S v Dube & Anor* 1988 (2) ZLR 385 (S).

<sup>29</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 17–8-9.

- The magistrate must record the explanation he gives the accused, together with any statement of acts or omissions given by the prosecutor.<sup>30</sup>
- Having explained the charge and essential elements, the magistrate must ask the accused person if he understands the charge and the essential elements of the crime and if his plea of guilty is an admission of those elements and of the acts or omissions set out in the charge or stated by the prosecutor.<sup>31</sup>
- The magistrate must record any reply the accused makes to the above enquiry.

Having done all that, the magistrate may convict the accused person on the strength of his plea of guilty.

## 2. *Where the accused person is legally represented:*

If the accused person is represented by a legal practitioner, the magistrate must still satisfy himself that the accused understands the charge and essential elements, but may rely on a statement to that effect by the accused's legal practitioner.<sup>32</sup>

### *Evidence and conviction*

The magistrate may call on the prosecutor to present evidence on any aspect of the charge, both in regard to conviction and sentence.<sup>33</sup> He may, for example, want to make sure before convicting the accused that the facts set out in the charge, and admitted by the accused, do not disclose an attempt rather than the substantive crime charged.

Having followed the above procedure, the magistrate is then entitled to convict the accused person of the crime to which he has pleaded.

If, however, the magistrate has any doubt that the accused person really is guilty of the crime to which he has pleaded, or is not satisfied that the accused has admitted all the essential elements of the crime or all the acts or omissions on which the charge is based, or if he is not satisfied that the accused has no valid defence to the charge, then in all those cases the magistrate must enter a plea of not guilty and require the prosecutor to proceed with the trial. Any admissions made by the accused up to that point, however, may be used in evidence at the trial.<sup>34</sup>

After conviction, the court and the prosecutor may question the accused with regard to sentence, whether or not the accused elects to give evidence.<sup>35</sup> There is no specific provision stating that his answers, or his failure to answer, may be used as evidence against him, but that is the implication of the provision.

### *Generally*

An accused person is entitled to a fair trial, and the procedure laid down in section 271 of the Criminal Procedure and Evidence Act must be seen in that context: a person's trial cannot be said to have been fair if he did not fully understand the charge he was facing.<sup>36</sup>

---

<sup>30</sup> Section 271(3) of the Criminal Procedure and Evidence Act. It is not enough simply to write "elements explained". The elements that have been explained to the accused must be recorded: *S v Sibanda* 1989 (2) ZLR 329 (S).

<sup>31</sup> Section 271(2)(b)(ii) of the Criminal Procedure and Evidence Act.

<sup>32</sup> Section 271(2)(b), proviso, of the Criminal Procedure and Evidence Act.

<sup>33</sup> Section 271(4) of the Criminal Procedure and Evidence Act.

<sup>34</sup> Section 272 of the Criminal Procedure and Evidence Act.

<sup>35</sup> Section 271(5) of the Criminal Procedure and Evidence Act.

<sup>36</sup> *S v Dube & Anor* 1988 (2) ZLR 385 (S) and *S v Chidawu* 1998 (2) ZLR 76 (H) at 80.

Hence, even in cases where section 271(2)(b) does not apply — i.e. petty cases and cases heard in the High Court — judicial officers must ensure that the accused person’s plea is understandingly made.

### A note on plea bargaining

If an accused person is legally represented, he may plead guilty on the basis of facts agreed to by his lawyer and the prosecutor and recorded in a statement of agreed facts. This will happen where, before the trial, the defence lawyer has negotiated the terms on which the accused is prepared to plead guilty. The statement of agreed facts will set out facts which the accused and his lawyer hope the court will find mitigating and justifying a more lenient sentence. Prosecutors should be careful not to agree to improbable facts or facts which are not justified by the evidence.

Where a plea of guilty has been negotiated in this way, the prosecutor or the defence lawyer will hand in the statement of agreed facts to the court after the accused has pleaded, and the judge or magistrate will impose sentence on the basis of those facts. However, the statement does not and cannot bind the judge or magistrate to impose a particular sentence, so when negotiating the plea the prosecutor cannot guarantee the sentence that the accused will receive.

In other countries plea bargaining, as it is called, is more institutionalised and does involve the courts. Plea bargaining began in the United States of America in the 1920s, when an increasing backlog of criminal cases made it imperative to find a way to deal with them quickly. In Federal courts in the USA there are two types of plea bargain: those that do not bind the court to impose any particular sentence (i.e. like the Zimbabwean system outlined above) and those that do bind the court.<sup>37</sup> The US Supreme Court ruled in 1970<sup>38</sup> that plea bargaining was constitutional so long as the incentives to plead guilty were not so large or coercive as to overrule accused persons’ ability to act freely, and so long as the system was not used in such a manner as to give rise to a significant number of innocent people pleading guilty.

Plea bargaining is now so widespread in the United States that in 1980 only 19 per cent of defendants (i.e. accused persons) were tried on pleas of not guilty; now (2017) only 3 per cent are.<sup>39</sup>

Plea bargaining has spread beyond the United States, and now some 66 countries round the world use it.

In South Africa plea bargaining is regulated by section 105A of the Criminal Procedure Act 1977 (No. 51 of 1977). Under that section prosecutors can negotiate plea bargains only with accused persons who are legally represented. They must also consult the police and, where it is reasonable to do so, allow victims or their representatives an opportunity to comment on the proposed terms of the bargain. Where a plea bargain has been agreed on, the prosecutor must inform the court before the accused has pleaded that it has been entered into and, if the court is satisfied that it was properly negotiated, the plea bargain is disclosed to the court. The court must then question the accused to make sure that he admits committing the crime and that he entered into the agreement freely and voluntarily, in his sound and sober senses and without undue influence. Then, if the court is satisfied that the ac-

---

<sup>37</sup> They are agreements under rules 11(c)(1)(B) and 11(c)(1)(C) respectively of the Federal Rules of Criminal Procedure.

<sup>38</sup> In *Brady v United States* 397 US 742 (1970).

<sup>39</sup> “A Deal You Can’t Refuse”, *The Economist* 17th November 2017.

cused is indeed guilty of the crime and that any agreement as to sentence is just, the court will proceed to sentence the accused in accordance with the agreement.

#### *Advantages and disadvantages of plea bargaining*

Plea bargaining allows criminal cases to be disposed of efficiently and speedily by giving accused persons an incentive to plead guilty. It may also afford them an opportunity to get out of prison quickly if they are in custody pending trial.

On the other hand, it can all too easily lead to innocent people being pressured into pleading guilty and serving sentences for crimes they did not commit. This may happen through prosecutors charging accused persons with multiple counts of serious crimes, sometimes with little evidence to back them up, in order to frighten the accused into pleading guilty to a less serious crime. In the USA, a study was conducted of 300 cases where accused persons had been convicted of serious crimes but later DNA evidence, not available at the time of their trials, showed that they were innocent. Of those 300, just over 30 of the accused had pleaded guilty. Another study showed that a quarter of persons convicted of murder but later cleared had falsely confessed to the crimes.<sup>40</sup>

#### ***Autrefois Acquit or Autrefois Convict***

The accused may plead that he has already been acquitted or convicted of the crime with which he is being charged; such a plea is known respectively as *autrefois acquit* (previously acquitted) or *autrefois convict* (previously convicted). This plea gives effect to the rule, stated in section 70(1)(m) of the Constitution, that no one should be tried twice for the same crime (*nemo debet bis vexari pro una et eadem causa*). If the plea is successful, it effectively bars any further proceedings, so it must be adjudicated upon before the trial commences.

When the plea is raised, the court should determine the issues arising from it separately from the main issues at the trial, and should deliver a separate judgment on it.

For the plea to succeed, the accused must show that he was “in jeopardy” (i.e. in danger) at the previous trial of being convicted of the charge that he now faces,<sup>41</sup> or a substantially similar charge, i.e. that he was previously tried, whether inside or outside Zimbabwe<sup>42</sup>:

- on substantially the same charge;
- by a court of competent jurisdiction; and
- the conviction or acquittal was on the merits.<sup>43</sup>

It is not enough for him to show that the charge in the previous trial was based on the same facts: he must have been in jeopardy of being convicted of the charge which he now faces. In all such cases, it is the substance and not the mere form of the charges that must be looked at: the question is whether the charges are substantially the same.<sup>44</sup>

---

<sup>40</sup> *Ibid.*

<sup>41</sup> Which means, of course, that the earlier proceedings must have been criminal rather than civil. If they were civil proceedings then the accused would have been in no danger of being convicted, even if the proceedings concerned the same subject-matter: *S v Paragon Real Estate & Anor* 2009 (1) ZLR 208 (H).

<sup>42</sup> In *S v Pokela* 1968 (4) SA 702 (E), the accused was able to raise the plea on the ground that he had been tried and acquitted of a crime in Lesotho which was the equivalent of the one for which he was being tried in South Africa.

<sup>43</sup> *Lansdown & Campbell S.A. Criminal Law & Procedure* vol 5 p. 437. Strictly, the requirement that the previous conviction must have been on the merits is superfluous, since a conviction can only be on the merits.

<sup>44</sup> *R v Manasewitz* 1933 AD 165, 1934 AD 95.

Examples:

- Where a person is charged with murder and is acquitted of that charge, but is convicted of assault (a competent verdict on a charge of murder), he cannot subsequently be charged with culpable homicide in respect of the same victim.
- Where a person has been convicted or acquitted of attempted murder, on the other hand, he may be charged with murder or culpable homicide if his victim later dies as a result of the assault.<sup>45</sup>

The requirement that the acquittal must have been on the merits means that the court, at the trial or on appeal, must have considered the merits of the case and not have acquitted the accused on a mere procedural technicality. Hence, where an accused had been convicted of murder, but his conviction was overturned on appeal on a technicality — that a deputy sheriff had sat with the jury while they deliberated — it was held that he could subsequently be tried again for the same murder.<sup>46</sup> This was because the defect in the proceedings was so great as to render them a nullity – no proper decision had been reached by the jury, so there had not been a conviction at all. Hence the accused had not been in jeopardy. On the other hand, where an interpreter who interpreted the evidence of three witnesses in a murder trial was not properly sworn, it was held that the defect was not so great as to nullify the trial so the accused could not be tried again for the same murder.<sup>47</sup> If a prosecutor withdraws a charge after the accused has pleaded not guilty, the accused's resultant acquittal would be on the merits even if no evidence has been led, because the accused was in jeopardy of being convicted; hence the accused could not be tried again on the same charge.<sup>48</sup> It may seem strange that a person can be regarded as having been acquitted on the merits if no evidence has been led, but as was explained in *S v Mthetwa* 1970 (2) SA 310 (N), once an accused person has pleaded he is entitled to an acquittal, and it would be illogical if he could plead *autrefois acquit* if he was acquitted on the ground of insufficiency of evidence, but could not plead it if he was acquitted because no evidence at all had been led. On the other hand, if a prosecutor withdraws a charge before the accused has pleaded, the accused can be charged again with the same crime because until he has pleaded he is not in jeopardy of being convicted.

According to section 381 of the Criminal Procedure and Evidence Act, if a conviction is set aside on appeal or review on the ground that the indictment or charge sheet is invalid or defective, or that there were technical irregularities or defects, or that the proceedings were a nullity, proceedings may be brought again in respect of the same crime. The same judicial officer must not, however, preside over the subsequent trial.

The onus of establishing that the earlier crime is the same or substantially similar to the crime with which the accused is currently charged, rests on the accused and must be done by producing the record of the previous trial, or a copy of the record, certified by the clerk or registrar of the court concerned, and by oral evidence that the accused is the same person as the accused in that trial.<sup>49</sup> In raising the plea, however, all the accused has to say is that he was previously convicted or acquitted of the crime; only when he has raised the plea may he be required to establish the facts on which it is based by producing the record of the

---

<sup>45</sup> *S v Gabriel* 1970 (2) RLR 251 (A).

<sup>46</sup> *S v Moodie* 1962 (1) SA 587 (A).

<sup>47</sup> *S v Naidoo* 1962 (4) SA 348 (A).

<sup>48</sup> *S v Ndou & Ors* 1971 (1) SA 668 (A); *S v Nhari* 1984 (2) ZLR 69 (S).

<sup>49</sup> Lansdown & Campbell S.A. *Criminal Law and Procedure* vol 5 p. 446.

previous proceedings.<sup>50</sup> In practice, particularly where the accused is not legally represented, the prosecutor is called on to look into whether or not the accused was previously convicted or acquitted.

### ***Absence of jurisdiction***

The accused may plead that the court has no jurisdiction to try him, for example that the crime was committed outside the court's area of jurisdiction or because the crime is not one which can be tried by the court. Other examples would be a claim of diplomatic immunity, i.e. that the accused is protected by diplomatic immunity from being tried by the court,<sup>51</sup> or a claim of parliamentary privilege, i.e. that the charge against the accused arises from something that was said in Parliament which is protected by privilege.<sup>52</sup>

As with a plea of *autrefois acquit/convict*, once a plea to the jurisdiction has been made the court must proceed to try the issues arising from the plea. The onus of showing that the court has jurisdiction rests with the prosecution.<sup>53</sup>

If the accused does not raise the question of jurisdiction in a magistrates court, the fact that the court did not have territorial jurisdiction to try him does not affect the validity of the conviction.<sup>54</sup> Conversely, however, it is not altogether clear from section 164 of the Criminal Procedure and Evidence Act what happens if the accused successfully raises a plea to the jurisdiction of a magistrates court but does not request that he be tried by some proper court.<sup>55</sup>

### ***Presidential pardon***

The accused may plead that he has been pardoned by the President for the crime charged. The onus here is on the accused to prove the pardon. Note, incidentally, that the effect of an amnesty is the same as that of a pardon: an amnesty is a pardon granted simultaneously to a number of people.

### ***Plea that accused was given immunity after giving evidence as accomplice***

- Under section 267 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] an accomplice can be compelled to give evidence in a criminal trial and answer incriminating questions. If he answers all questions put to him fully to the satisfaction of the court (i.e. if he answers the questions truthfully) the court will discharge him from liability to prosecution for the crime to which he was an accomplice. The immunity has the effect of a pardon. There are certain requirements to be fulfilled before they can be given this immunity:
  - The prosecutor must inform the court that the witness is, in his opinion, an accomplice;

---

<sup>50</sup> Section 184 of the Criminal Procedure and Evidence Act.

<sup>51</sup> A claim that was unsuccessfully raised in the case of *S v Penrose* 1966 (1) SA 5 (N).

<sup>52</sup> Note that members of Parliament cannot be brought before a court outside Harare, whether as a witness or as a party, in civil proceedings while Parliament is in session. This does not apply to criminal proceedings, however: sec 7 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*].

<sup>53</sup> *S v Radebe* 1945 AD 590.

<sup>54</sup> Section 187 of the Criminal Procedure and Evidence Act.

<sup>55</sup> See Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–21.

- The accomplice must fully and to the satisfaction of the court answer all lawful questions put to him.

This is not one of the pleas mentioned in section 180 of the Criminal Procedure and Evidence Act.

It should be pointed out, incidentally, that the evidence of unconvicted accomplices – i.e. accomplices who give evidence under section 267 – may not accorded much weight because of the suspicion that they are trying to exonerate themselves by putting all the blame on the accused persons against whom they are giving evidence. If therefore an accomplice is willing to give evidence against his fellows, it may be better for the prosecutor to have the accomplice tried and convicted separately, on a plea of guilty, and once the accomplice has been sentenced and, probably, given a lenient sentence, to call him to give evidence against the others.

### ***Permanent stay of prosecution***

The accused may plead that a court has ordered a permanent stay of the prosecution in terms of section 167A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], or that he is entitled to such a stay on the ground of an unreasonable delay in bringing him to trial for the crime. In an earlier lecture we dealt with what amounts to an unreasonable delay.

### ***Absence of title by the prosecutor***

The accused may plead that the prosecutor has no title to prosecute. The most likely use of this plea is in a private prosecution, where the accused challenges the right of the private person to bring the prosecution, but it may also be raised if the prosecutor has not been authorised by the Prosecutor-General to prosecute within the province or regional division where the trial is taking place.

### ***Lis pendens***

This plea is not mentioned in section 180, but it is available to an accused person. It is that a criminal case on the same charge is pending in another court.

### ***[Truth of defamatory matter]***

Section 183 of the Criminal Procedure and Evidence Act states that if a person charged with criminal defamation wants to plead justification (i.e. truth and public interest), he must specially plead that defence. Since defamation is no longer a crime,<sup>56</sup> section 183 falls away.

### ***Combination of pleas***

Any combination of pleas may be tendered, though a guilty plea may not be joined to any other plea.<sup>57</sup>

## **Notice of pleas**

If an accused person intends to tender a plea other than guilty or not guilty, he must give reasonable notice to the Prosecutor-General or his representative, if the trial is in the High Court, or to the public prosecutor, if the trial is in the magistrates court.<sup>58</sup> The Prosecutor-

---

<sup>56</sup> *Madanhire & Anor v Attorney-General* CCZ 2-2015.

<sup>57</sup> Section 180(3) of the Criminal Procedure and Evidence Act.

<sup>58</sup> Section 179 of the Criminal Procedure and Evidence Act.

General's representative or the public prosecutor may waive the requirement of notice, or the court may dispense with it on good cause shown.

### **Alteration of plea**

After pleading guilty, an accused may apply, whether before or after conviction, for his plea to be altered to one of not guilty. The accused need merely give a reasonable explanation for having pleaded guilty originally; he need not prove the explanation, and the court must allow him to change the plea unless the court is satisfied beyond a reasonable doubt that the explanation is false.<sup>59</sup> If the application is granted, the court will require the prosecutor to proceed with the case, but any admissions made by the accused before the alteration of his plea will stand as evidence in the trial.<sup>60</sup>

An accused person can at any time during the trial alter a plea of not guilty to one of guilty. He may do this if he realises that his defence to the charge unlikely to succeed, and hopes to get the benefit of a lighter sentence by pleading guilty.

After sentence has been passed it is no longer possible for the trial court to alter an accused person's plea because the court is now *functus officio*. The accused's only recourse is to take the matter up on appeal or review.

### **Accused entitled to verdict after plea**

Once an accused person has been called upon to plead to a charge, he is entitled to demand that he be acquitted or found guilty by the judge or magistrate before whom he has pleaded.<sup>61</sup> There are exceptions, however:

- Where the accused has pleaded not guilty and no evidence has been led, the trial may be continued before another judge or magistrate. The same applies where the accused has pleaded guilty and no evidence has been led and no inquiry has been made in terms of section 271(2)(b) of the Criminal Procedure and Evidence Act.<sup>62</sup>
- Where the judge or magistrate recuses himself from the trial.
- Where a separation of trials takes place.
- Where, after evidence has been led, the judge or magistrate dies, retires, resigns or is dismissed. In the case of death or incapacity (other than temporary incapacity), the trial is a nullity and can be commenced afresh before another judicial officer. If a magistrate becomes ill and his incapacity is likely to last for a considerable time, the proceedings should be set aside on review so that they can be commenced afresh before another magistrate.<sup>63</sup> In the event of retirement, resignation or dismissal the proceedings become abortive and lapse without their having to be set aside.<sup>64</sup>
- Where the Prosecutor-General applies for a private prosecution to be stopped so that the State can prosecute the accused *de novo*.

---

<sup>59</sup> *R v Difford* 1937 AD 370; *S v Matare* 1993 (2) ZLR 88 (S); *Attorney-General, Tvl v Botha* 1994 (1) SA 306 (A); *S v Dzvairo & Ors* 2006 (1) ZLR 45 (H) at 57G; *S v Chikwashira* 2014 (2) ZLR 10 (H).

<sup>60</sup> Section 272 of the Criminal Procedure and Evidence Act.

<sup>61</sup> Section 180(6) of the Criminal Procedure and Evidence Act.

<sup>62</sup> Section 180(6), proviso, of the Criminal Procedure and Evidence Act.

<sup>63</sup> *S v Makoni & Ors* 1975 (2) RLR 75 (G).

<sup>64</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 28-6. Note, though, that judges who retire may continue to deal with part-heard cases: section 186(4) of the Constitution.

- Where the accused is found to be mentally disordered.

## 18. OUTLINE OF STATE AND DEFENCE CASES

### High Court

In the High Court, after the accused has pleaded not guilty, the prosecutor may (and usually does) address the court in order to explain the charge and outline the evidence which he intends to lead. He must not comment on the evidence.<sup>1</sup>

### Magistrates court

In a trial before a magistrate, once the accused has pleaded not guilty the prosecutor must make a statement outlining the nature of his case and the material facts on which he relies.<sup>2</sup> This statement must be recorded.<sup>3</sup> The statement should concisely outline the nature of the case and the material facts; it should not contain evidence that the prosecutor does not intend to lead. It is most irregular for the prosecutor to include the contents of any statement made by the accused — all he should say, if he intends to lead evidence of such a statement, is that the accused made a statement which will be tendered in evidence.<sup>4</sup>

After the prosecutor has outlined his case, the accused must be asked to make a statement outlining the nature of his defence and the material facts on which he relies. If the accused is not legally represented, the magistrate is obliged by section 188(b) of the Criminal Procedure and Evidence Act to advise him of his right to remain silent and of the consequences of exercising that right. Section 189 of the Act goes on to say that if an accused fails to mention any fact which he could reasonably be expected to have mentioned, the court can draw adverse inferences from the failure and may treat the failure as corroborating other evidence against him. This may well be unconstitutional because the accused has a right to silence<sup>5</sup> and he cannot be penalised for exercising that right.

If the accused does make a statement:

- It may be taken into account in deciding whether or not he is guilty, but may not be taken into account in deciding whether he should be acquitted (i.e. discharged) at the end of the State case.<sup>6</sup>
- If the accused departs from the statement in a material respect in any evidence he gives later in the trial, this may be a matter for comment and adverse conclusion.<sup>7</sup> Note that this does not apply to the State: if there is a divergence between the outline of the State case and the testimony of the witnesses, an adverse inference will not be drawn unless the divergence is so great as to be utterly irreconcilable. This is because the State outline is often a précis of the witnesses' statements, compiled by a police officer with little legal training, and is usually compiled without consulting the complainant or other witnesses.<sup>8</sup> (But is this a real justification for the distinction between the defence and

---

<sup>1</sup> Section 198(1) of the Criminal Procedure and Evidence Act.

<sup>2</sup> Section 188(a) of the Criminal Procedure and Evidence Act.

<sup>3</sup> *S v Seda* 1980 ZLR 109 (G).

<sup>4</sup> *S v Nkomo* 1989 (3) ZLR 117 (S).

<sup>5</sup> In terms of section 70(1)(i) of the Constitution.

<sup>6</sup> Section 189(1) of the Criminal Procedure and Evidence Act.

<sup>7</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–28. *S v Seda* 1980 ZLR 109 (G) at 110 and *S v Mandwe* 1993 (2) ZLR 233 (S) at 236-7.

<sup>8</sup> *S v Chigova* 1992 (2) ZLR 206 (S) at 213 and *S v Mandwe* 1993 (2) ZLR 233 (S) at 237C-D.

State outlines? A discrepancy is a discrepancy, whether it is in the State or the defence outline, and if it is material it should be explained.)

The court is entitled to put questions to the accused to clarify any matter with regard to the statement in order to establish which allegations in the charge are in dispute. But the questioning must not go beyond that, and the court must inform the accused that he is not obliged to answer the questions — failure to inform the accused of this is an irregularity.<sup>9</sup>

---

<sup>9</sup> *S v Mbisi* 1992 (2) SACR 441 (W), cited in Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 253.

## 19. PROSECUTION CASE

### Evidence for the prosecution

After the opening address, the prosecutor should then call witnesses for the prosecution and adduce whatever evidence is admissible to prove that the accused is guilty of the crime charged, or any other crime of which he may be convicted on that charge.

Except where provision is made to the contrary in a statute, witnesses must give their evidence orally in open court.<sup>1</sup> They must give their evidence on oath, unless they are allowed to make an affirmation or they are too young or ignorant to understand the nature of an oath or affirmation or to recognise its religious obligation.<sup>2</sup>

The prosecutor has a discretion as to the order in which he calls witnesses and leads evidence, but Reid Rowland (*Criminal Procedure in Zimbabwe* p. 16–29) suggests the following:

- Where there are several counts, the witnesses should be called, as far as possible, in the order in which the counts are set out in the charge.
- Exhibits should be put in as soon as possible. Where there are several counts, the exhibits should be put in following the order of the counts to which they relate.
- When there are several counts and numerous witnesses, the court should be told which count or counts each witness is giving evidence on.

A document that is admitted in evidence should be read out by the witness who is producing it (where it is susceptible of being read; if it is a document such as a receipt or an account which cannot be read out easily, its nature and salient features should be explained by the witness). If it is admissible on its mere production, then the prosecutor should read it out, unless the accused or his legal practitioner has consented to dispense with having it read out.<sup>3</sup>

When examining a State witness, the prosecutor should not put leading questions (i.e. questions which suggest the answer the prosecutor is seeking), at least not in regard to matters which are or may be in dispute. Leading questions may be asked to elicit introductory or undisputed matters, such as the witness's name and address.<sup>4</sup>

The prosecutor's duty to disclose discrepancies between the evidence given by State witnesses and their statements to the police has been dealt with above, under the heading "Prosecution of the Case — Duties of Prosecutors".

Once a witness is giving evidence it is grossly improper for the prosecutor to interview the witness privately (e.g. during an adjournment), without informing the court before doing so and explaining why the interview is necessary.<sup>5</sup>

---

<sup>1</sup> Section 194(1) of the Criminal Procedure and Evidence Act.

<sup>2</sup> Sections 249 to 251 of the Criminal Procedure and Evidence Act.

<sup>3</sup> Section 198(2) of the Criminal Procedure and Evidence Act.

<sup>4</sup> For a discussion of leading questions in examination-in-chief and cross-examination, see Hoffmann & Zeffertt *The S.A. Law of Evidence* 4th ed p. 444-6.

<sup>5</sup> *S v Wise* 1974 (2) RLR 194 (A).

### **Cross-examination and re-examination of State witnesses**

After each State witness has been examined by the prosecutor, the accused or his legal practitioner is entitled to cross-examine the witness.<sup>6</sup> The purpose of cross-examination is to elicit evidence which supports the cross-examiner's case and, secondly, to cast doubt on the evidence given for the opposing party. Accordingly, the accused or his representative should put to each State witness as much of the defence case as concerns that witness and inform the witness of other witnesses who will contradict him. The witness should be given a fair opportunity to explain the contradictions put to him. It is improper to let a witness's statement go unchallenged in cross-examination and then argue later that the witness should not be believed.<sup>7</sup>

Unrepresented accused persons often do not understand the purposes of cross-examination and are unskilled in its techniques. The judicial officer has a duty, therefore, to assist such an accused who shows an insufficient understanding of his right to cross-examine and of the consequences of a failure to exercise that right<sup>8</sup>, and should put pertinent questions to the witness. A judicial officer must always grant the accused or his representative sufficient opportunity to cross-examine fully.

After a State witness has been cross-examined, the prosecutor is entitled to re-examine the witness, to enable the witness to explain his answers to questions put to him in cross-examination. Hence questions in re-examination must be confined to matters arising from cross-examination.<sup>9</sup>

### **Close of State case**

After all the evidence for the State has been led, the prosecutor must close his case. The judicial officer cannot close it if the prosecutor is unwilling to do so. But if the prosecutor refuses to do so after the court has rejected an application for postponement, and declines to lead any further evidence, then the court may proceed as if the prosecutor had indeed closed the State case.<sup>10</sup>

### **Discharge of accused at close of State case**

If at the end of the State case the court considers that there is no evidence that the accused committed the crime charged or any other crime of which he might be convicted on that charge, the court must ("shall") return a verdict of not guilty.<sup>11</sup> The court may do so of its own volition or on the application of the accused or his legal representative.<sup>12</sup> If an application for discharge is granted it terminates the case completely.<sup>13</sup>

---

<sup>6</sup> Section 191 of the Criminal Procedure and Evidence Act.

<sup>7</sup> But there is no absolute rule in this regard: *S v Chigwana & Ors* 1976 (1) RLR 349 (A). And where the accused is not legally represented it may be unfair and unjust to draw an adverse inference from his failure to cross-examine: *S v Sebatana* 1983 (1) SA 809 (O).

<sup>8</sup> *S v Khambule* 1991 (2) SACR 277 (W), cited by Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 231.

<sup>9</sup> For a discussion of re-examination, see Hoffmann & Zeffertt *The S.A. Law of Evidence* 4th ed p. 469.

<sup>10</sup> *S v Magoda* 1984 (4) SA 462 (C).

<sup>11</sup> Section 198(3) of the Criminal Procedure and Evidence Act.

<sup>12</sup> *S v Mkize & Ors* 1960 (1) SA 276 (N) at 280E-G.

<sup>13</sup> *R v Dzingayi & Ors* 1965 RLR 171 (G).

### **When application for discharge may be made**

An application for the accused's discharge should be made at the close of the State case and before the defence case has been opened. There is no statutory provision requiring the court to inform the accused of his right to ask for a discharge. On the other hand, as already indicated the judicial officer has a duty to ensure that an unrepresented accused understands his rights and the options open to him at all stages of the trial<sup>14</sup>, so in appropriate cases the judge or magistrate should invite an unrepresented accused to apply for his discharge.

### **When discharge should be ordered**

Section 198(3) of the Criminal Procedure and Evidence Act does not give the judicial officer a discretion to discharge, or not to discharge, an accused:

“If ... the court considers that there is no evidence that the accused committed the offence charged, or any other offence of which he might be convicted ... it *shall* return a verdict of not guilty.”

If the court considers there is no evidence against the accused, then it must discharge him by returning a verdict of not guilty.<sup>15</sup>

There is a basis for ordering the discharge of the accused where:<sup>16</sup>

- there is no evidence to prove an essential element of the crime;
- there is no evidence on which a reasonable court, acting carefully, might properly convict;
- the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.<sup>17</sup>

Because of the word “shall” in section 198(3), a court must discharge the accused in all these three circumstances; the court has no discretion.

In making a decision whether or not to discharge the accused, the court must look at the State's evidence; the court is not allowed to look at the accused's outline of his defence, except in so far as the accused has admitted any of the State's allegations.<sup>18</sup> Also, the court is not allowed to refrain from discharging the accused on the ground that the inadequate evidence of the prosecution may be supplemented by defence evidence (i.e. on the ground that the accused may convict himself out of his own mouth or that a co-accused may incriminate him).<sup>19</sup>

However, if the court omits to discharge the accused in these circumstances, and the accused subsequently gives evidence and incriminates himself, does that irregularity vitiate the proceedings? In *S v Kachipare* 1998 (2) ZLR 271 (S), the Supreme Court held that it would not do so. In *Kachipare's* case the appellant and a co-accused were jointly charged with the murder of a child. The appellant pleaded not guilty, the co-accused guilty, but as

---

<sup>14</sup> Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 283.

<sup>15</sup> Note that in South Africa the court is given a discretion whether or not to discharge the accused: see section 174 of the Criminal Procedure Act, 1977. As to how that discretion is to be exercised, see *S v Lubaxa* 2001 (4) SA 1251 (SCA) at 1255D to 1257A.

<sup>16</sup> *S v Kachipare* 1998 (2) ZLR 271 (S) at 276.

<sup>17</sup> This will happen only rarely, in clear cases where the credibility of a witness has been so utterly destroyed that no material part of his or her evidence can be believed: *S v Tsvangirai & Ors* 2003 (2) ZLR 88 (H) at 94E-F.

<sup>18</sup> Section 189(1) of the Criminal Procedure and Evidence Act.

<sup>19</sup> *S v Kachipare* 1998 (2) ZLR 271 (S) at 276.

mentioned earlier there is a rule of practice in the High Court that when an accused person pleads guilty to murder a plea of not guilty is entered, so pleas of not guilty were entered for both the appellant and her co-accused. The trials were not separated because no application for separation was made. The only evidence led by the State which linked the appellant to the crime was purely circumstantial, and at the end of the State case the appellant's legal practitioner applied for her discharge. The trial judge refused it, wrongly, and when the co-accused came to give evidence she implicated the appellant. The appellant was accordingly convicted. On appeal it was argued that the trial court should have ordered the appellant's discharge at the close of the State case. The Supreme Court agreed with that submission, but said that the trial court's failure to do so was not such an irregularity that it resulted in a substantial miscarriage of justice justifying the setting aside of the conviction in terms of section 12(2) of the Supreme Court Act [Chapter 7:13]. At page 280D-E Gubbay CJ said:

“I think there is good sense in the approach that a refusal to discharge the accused upon the conclusion of the State case is not in itself a sustainable ground for appeal against an ultimate conviction. ... [I]n order to decide whether the conviction was justified, it would be absurd for the appeal court to close its eyes to any evidence led on behalf of the accused ... which, taken in conjunction with the State evidence, had been held correctly by the trial court to prove guilt conclusively.”

See also *S v Noormohamed* 2012 (1) ZLR 367 (H).

In *S v Lubaxa* 2001 (4) SA 1251 (SCA), the South African Supreme Court of Appeal came to a different conclusion, holding that failure to discharge an accused person at the close of the State case, where there is no possibility of a conviction unless the accused gives evidence and incriminates himself, is a breach of the accused's constitutional right to a fair trial and ordinarily vitiates a conviction based exclusively on his or her self-incriminatory evidence. The court suggested that the accused's right to a discharge in these circumstances arises not necessarily from the right to silence or the right not to testify, but from an extension of the common-law principle that a person should not be prosecuted unless there is “reasonable and probable” cause to believe that he or she is guilty of a crime: if a prosecution cannot be commenced without that minimum of evidence, the court said, a prosecution should cease when the evidence finally falls below that threshold. This view, with respect, is preferable to the one expressed by our court in *Kachipare's* case.

If the Prosecutor-General is dissatisfied with a decision to discharge the accused at the close of the State case, he may appeal against that decision to the High Court (where the decision was made by a magistrate) or to the Supreme Court (where the decision was made by a judge of the High Court). In either case he must get leave from a judge of the appellate court before he can appeal.<sup>20</sup> On an appeal the appeal court may confirm the trial court's decision or set it aside and remit the case for a continuation of the trial or for trial afresh before a different judicial officer.<sup>21</sup>

The accused has no right to appeal against a refusal by the court to discharge him, until after the final determination of the case – i.e. until after the court has convicted and sentenced him. Then he has a right to appeal, but his appeal will succeed only:

---

<sup>20</sup> Section 198(4) of the Criminal Procedure and Evidence Act.

<sup>21</sup> Section 198(5) of the Criminal Procedure and Evidence Act.

“if it is found that at the close of the prosecution’s case evidence justifying a conviction was absent and the defence case furnished no proof of guilt.”<sup>22</sup>

It seems, however, that an accused may be entitled to approach the High Court to set aside on review a magistrate’s decision not to discharge him at the close of the State case, if he can show that the decision amounted to a gross irregularity.<sup>23</sup>

---

<sup>22</sup> Per Gubbay CJ in *S v Hunzvi* 2000 (1) ZLR 540 (S) at 542. This of course assumes that *Kachipare*’s case is correct and that a trial court’s wrongful decision not to discharge the accused at the close of the State case will not justify acquitting the accused on appeal if the defence case ends up incriminating the accused.

<sup>23</sup> *Attorney-General v Makamba* 2005 (2) ZLR 54 (S).

## 20. DEFENCE CASE

### Informing the accused of his rights

If the accused is not discharged, the court must ask him or his legal practitioner if he intends to lead evidence and if the accused himself will give evidence. If the accused is not legally represented, the court is obliged by section 198 of the Criminal Procedure and Evidence Act<sup>1</sup> to inform him that:

- he will not be allowed to call his witnesses, if any, until after he has given evidence or been questioned by the prosecutor or the court;
- even if he chooses not to give evidence he is liable to be questioned by the prosecutor and the court;
- if he gives evidence or is questioned and refuses to give an answer, he will be asked why he refuses to answer; and
- if he persists in his refusal, the court may draw such inferences from the refusal as appear proper and that the refusal may be treated as corroborating any other evidence given against the accused.

This provision, in so far as it refers to the accused being questioned by the court and the prosecutor, and to inferences that may be drawn from a failure to mention facts, is unconstitutional in that it infringes the accused's right to silence. On the other hand, in the interests of a fair trial the court must inform an unrepresented accused of his right to give evidence and of the consequences of not doing so (i.e. failing to rebut the prosecution case) and must also inform him that if he chooses to give evidence he must do so before calling any other witnesses.

### Defence evidence

Normally, the accused must give his evidence or be questioned by the prosecutor and the court before any other evidence is led for the defence, unless the court orders otherwise. This prevents the accused from tailoring his evidence to fit that of his witnesses. If he gives evidence the prosecutor has a right to cross-examine him.

If when giving evidence an accused person fails to mention facts, or lies, or is otherwise unreliable the court can obviously draw whatever inferences are appropriate. On the other hand, if an accused person fails when giving evidence to mention facts relevant to his defence, the court should not necessarily draw adverse inferences, particularly if he is undefended and has mentioned the fact either to the police or in his defence outline or in cross-examination of State witnesses.<sup>2</sup>

The prosecutor is entitled to cross-examine witnesses called by the defence, and following the cross-examination the accused or his legal practitioner is entitled to re-examine them. What has been said previously in relation to cross-examination and re-examination of State witnesses applies equally here.

---

<sup>1</sup> Section 198(6) as read with sections 198(8) & (9) and 199(1).

<sup>2</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–37.

## **Questioning of accused**

If the accused declines to give evidence, the prosecutor and the court are permitted by section 198(9) of the Criminal Procedure and Evidence Act to question him, and if he is legally represented his legal practitioner may question him afterwards. This provision is probably unconstitutional by virtue of section 70(1)(i) of the Constitution, which states that an accused person has the right “to remain silent and not to testify or be compelled to give self-incriminating evidence”.

## 21. PROCEDURE AFTER CLOSE OF EVIDENCE

### Addresses by the parties

After the defence case has been closed the prosecutor is entitled to address the court, summing up the whole case.<sup>1</sup> He has the right to decide whether or not to do so. In his address the prosecutor must, as always, be fair and not strive at all costs for a conviction.<sup>2</sup>

The accused or his legal practitioner also has a right to address the court.<sup>3</sup> If the judicial officer fails or refuses to permit this right to be exercised, it is an irregularity which will generally result in the setting aside of a conviction.<sup>4</sup>

If the accused or his legal practitioner raises a matter of law, the prosecutor may reply and he may also, with the leave of the court, reply on any matter of fact raised by the accused in his address.

### Record of trial

A full and comprehensive record should be kept of the trial, and a failure to do so amounts to a gross irregularity, because without a record a review or appellate court cannot assess the correctness of the proceedings.<sup>5</sup>

The presiding judicial officer has the duty to ensure that a record is kept of the proceedings. If there is no mechanical recorder or shorthand writer available, the judicial officer must write down completely, clearly and accurately everything that is said and happens before him that is of any relevance to the merits of the case.<sup>6</sup>

Save in exceptional circumstances, a judicial officer must not alter the record after the trial; informal amendments may amount to a gross irregularity, leading to the quashing of the conviction.<sup>7</sup> The usual procedure for altering a magistrates court record is for the State to apply to the High Court for an amendment, serving a copy of the application on the magistrate and the accused. The application is accompanied by affidavits from persons who can indicate how the record is faulty and what corrections should be made to it.<sup>8</sup>

### Stopping of trial before verdict

Generally, after the accused has pleaded to the charge, the trial must continue until a verdict is reached, because once the accused has pleaded he is entitled to a verdict.<sup>9</sup> However, there are exceptions to this rule.

---

<sup>1</sup> Section 200 of the Criminal Procedure and Evidence Act [Chapter 9:07].

<sup>2</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–38.

<sup>3</sup> Section 200 of the Criminal Procedure and Evidence Act [Chapter 9:07].

<sup>4</sup> Lansdown & Campbell S.A. *Criminal Law & Procedure* vol 5 p. 526; Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 222.

<sup>5</sup> *S v Ndebele* 1988 (2) ZLR 249 (H); *S v Ncube* 2012 (1) ZLR 422 (H); Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–39; Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 222.

<sup>6</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–40.

<sup>7</sup> *S v Ndebele* 1988 (2) ZLR 249 (H); *S v Zuze* 2013 (2) ZLR 25 (H).

<sup>8</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 16–40; Geldenhuys & Joubert *Criminal Procedure Handbook* 2nd ed p. 222.

<sup>9</sup> Section 180(6) of the Criminal Procedure and Evidence Act [Chapter 9:07].

In terms of section 54(1) of the Magistrates Court Act [*Chapter 7:10*], a magistrate must stop a trial at any stage before verdict, even if the accused has pleaded guilty, in two circumstances:

- if it appears that the crime is from its nature only subject to the jurisdiction of a court of higher jurisdiction or is more properly dealt with by a court of higher jurisdiction (This might occur, for example, if the accused is charged with indecent assault and the evidence shows that the accused actually committed rape, or if he is charged with culpable homicide and the evidence shows that he killed intentionally); or
- if the prosecutor requests that the trial be stopped. Note that this isn't really a request on the part of the prosecutor; it is more a demand since the magistrate must stop the trial upon a request being made. The prosecutor might make such a request if the magistrate has refused to amend the charge against the accused and the prosecutor believes that the refusal will result in the accused being wrongly acquitted. The prosecutor should not make such a request lightly, since stopping a trial involves inconvenience to everyone concerned, particularly to an accused who is in custody. It is wrong, for example, to use the section to correct careless mistakes which should have been avoided at the outset.<sup>10</sup>

In both these cases the magistrate must stop the trial, adjourn the case and remand the accused, and submit a written report to the Prosecutor-General together with the record of the proceedings.

When a trial has been stopped in terms of section 54(1), the Prosecutor-General may:

- direct that the case be continued before the same magistrate (and if the magistrate is a junior magistrate, his or her jurisdiction is increased to four years' imprisonment or a fine of level nine or both;<sup>11</sup> or
- direct that proceedings be started afresh before a regional magistrate.<sup>12</sup>

The magistrate must inform the accused of the Prosecutor-General's decision, and must take steps to comply with the decision, either by continuing with the trial or by issuing a warrant committing the accused to prison until brought to trial in a regional court or admitted to bail.<sup>13</sup>

There is no provision in the law for trials in the High Court to be stopped in this way.

---

<sup>10</sup> *S v Moyo (2)* 1978 RLR 469 (G) and Reid Rowland *Criminal Procedure in Zimbabwe* p.23-2.

<sup>11</sup> Section 50(1)(b) of the Magistrates Court Act [*Chapter 7:10*].

<sup>12</sup> Section 225 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>13</sup> Section 226(a) & (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

## 22. VERDICT

### Verdicts and judgments

A verdict is the decision of a court in a criminal case, i.e. the decision whether the accused is guilty or not guilty. A judgment is a statement of the reasons for the verdict. Judgments may be given orally, but must be recorded. Judgments can also be simply handed down in writing without being read out, though the verdict reached by the court should be read out by the judicial officer in open court. Sometimes a court will announce its verdict and say that reasons will follow – i.e. that a written judgment setting out the reasons for the verdict will be handed down later.

The verdict must generally be given in open court, subject to the rules relating to trials *in camera*.<sup>1</sup>

#### ***When judgment should be given***

The court will normally give its judgment immediately, where the facts and the law involved in the case are straightforward (an *ex tempore* judgment) but it may adjourn the proceedings to consider judgment.<sup>2</sup> A court has a duty to give its judgment promptly and without undue delay, because parties are entitled to judgment as soon as reasonably possible and lengthy delays destroy public confidence in the courts.<sup>3</sup> Under the judges' code of ethics issued by the Judicial Service Commission, judges must use their best efforts to ensure that judgments are given within 90 days and, save in unusual and exceptional circumstances judgments must be given within 180 days.<sup>4</sup> This does not override the general rule that judgments must be delivered as soon as possible, because justice delayed is justice denied.

#### ***Reasons for judgment***

A judgment must set out the judicial officer's reasons for reaching his decision.<sup>5</sup> If it does not it will be impossible to determine how the judge or magistrate reached his decision and whether it was reached on a properly reasoned basis. For a judicial officer not to record his reasons is a gross irregularity and will usually result in the conviction being set aside on appeal or review,<sup>6</sup> though it may be upheld if the evidence on record supports it.

---

<sup>1</sup> Section 334(1) of the Criminal Procedure and Evidence Act.

<sup>2</sup> Section 332 of the Criminal Procedure and Evidence Act.

<sup>3</sup> *Pharmaceutical Society of SA & Ors v Tshabalala-Msimang & Anor* NNO 2005 (3) SA 238 (SCA) at 261H. Section 19 of the Judicial Service (Code of Ethics) Regulations, 2012 (SI 107/2012) requires judges to use their best efforts to deliver judgment within 90 days and, save in exceptional circumstances, requires them to do so within 180 days.

<sup>4</sup> Judicial Service (Code of Ethics) Regulations, 2012 (S.I. 107 of 2012), section 19.

<sup>5</sup> *R v Majerero & Ors* 1948 (3) SA 1032 (A); *R v Van der Walt* 1952 (4) SA 382 (A). See also Geldenhuys & Joubert *Criminal Procedure Handbook* 10th ed p. 302.

<sup>6</sup> *S v Makawa & Anor* 1991 (1) ZLR 142 (S) at 146; *S v Maimba* 2014 (1) ZLR 705 (H).

## Possible verdicts

### **Acquittal**

If the verdict is one of not guilty, the accused is acquitted of the charge and is entitled to be liberated from custody on that charge.<sup>7</sup>

### **Conviction**

If the court is satisfied beyond reasonable doubt that the accused is guilty, it will convict him of the crime charged or of some other crime which the court has found proved.

### **Alternative counts**

If the accused was charged with two or more crimes in the alternative, the court can decide on which charge to convict him, if the evidence justifies finding him guilty on all the alternatives. In that event the court should find the accused guilty of whichever charge the court considers to be the most appropriate.<sup>8</sup> In that event also, the court should acquit the accused on the other alternatives.

### **Permissible [competent] verdicts**

If the law allows a person who is charged with a particular crime to be convicted of some other crime, then a conviction of that other crime is called a “permissible verdict”. To illustrate: a person charged with murder may be convicted of assault, if the evidence shows that he assaulted the deceased person but does not prove that he killed him. Hence, assault is said to be a permissible verdict on a charge of murder. Permissible verdicts are also called “competent verdicts”.

Most of the permissible verdicts are set out in the Criminal Law Code (sections 273-5 and the Fourth Schedule). The more general ones are as follows:

<i>Section</i>	<i>Charge</i>	<i>Permissible (competent) verdict</i>
273(a)	Any crime	Threatening, inciting, conspiring or attempting to commit that crime or any other crime of which the accused might be convicted on that charge
273(b)	Any crime	Assisting a perpetrator of that crime or of any other crime of which the accused might be convicted on that charge
274	Any crime	Any other crime whose essential elements are included in the crime charged
Fourth Schedule	Murder	Infanticide, culpable homicide, and any crime of which a person might be convicted if he were charged with infanticide or culpable homicide.

And so on. Other statutes also provide for permissible verdicts: for example the Road Traffic Act [*Chapter 13:11*]<sup>9</sup> allows a person who is charged with reckless driving to be convicted of the lesser crimes of negligent driving or driving without due care and attention.

---

<sup>7</sup> Section 341 of the Criminal Procedure and Evidence Act.

<sup>8</sup> *R v Tshuma & Anor* 1964 RLR 578 (G).

<sup>9</sup> Section 53(1).

## 23. SENTENCE

### Pre-sentence investigation

The presiding judicial officer has a wide discretion as to sentence, and must exercise it in order to arrive at a suitable sentence, one that fits the criminal as well as the crime, is fair to society, and is blended with a measure of mercy according to the circumstances.<sup>1</sup> The court must therefore ensure that it is in a position to arrive at a proper and just sentence. In order to arrive at such a sentence, the court must have as much factual information about the circumstances as possible.

Before assessing sentence, a judicial officer must equip himself with sufficient information to enable him to assess sentence humanely and meaningfully, and to reach a decision based on fairness and proportion; the needs of the individual and the interests of society should be balanced with care and understanding.<sup>2</sup> Hence pre-sentencing information is very important. Where the accused is not represented, the magistrate has a duty to canvass all these aspects with the accused, if necessary postponing the trial to enable the information to be obtained.

The need for pre-sentencing information is particularly important in the case of juvenile offenders:

“There can never be a just cause to proceed and sentence juvenile offenders without getting all useful information to guide the court on the question of sentence. This would include obtaining probation officers’ reports ... [and] ... might entail calling the accused’s parents or guardians or school authorities to shed light in the matter. The need for the probation officer’s reports in cases of this nature cannot be over-emphasised. While the courts face challenges in their dealings with the Department of Social Welfare, this can never be a just cause to proceed to sentence juvenile offenders without gathering all useful information to guide the court on the question of sentence. Even in the absence of a probation officer and probation officers’ reports, a trial court handling the matter of a juvenile should be innovative and seek to involve the family of the juvenile before coming up with a management scheme or sentence.”<sup>3</sup>

For a useful statement of the broad principles of sentencing, see *S v Shariwa* 2003 (1) ZLR 314 (H).

### **Proof of previous convictions**

The fact that an accused person has previous convictions will usually affect the sentence to be imposed upon him, though it is not an aggravating feature.<sup>4</sup> The weight that the court will attach to the previous convictions will depend on their nature.

The onus is on the prosecution to prove that the accused has previous convictions, and if he has any it is generally important to prove them, particularly in cases where he was previously given a suspended sentence and his current conviction is a breach of the conditions of suspension.

---

<sup>1</sup> *S v Rabie* 1975 (4) SA 855 (A) at 862.

<sup>2</sup> *S v Ngulube* 2002 (1) ZLR 316 (H).

<sup>3</sup> *S v Ncube & Ors* 2011 (1) ZLR 608 (H) (headnote).

<sup>4</sup> *R v Harris* 1959 (2) R & N 394 (SR).

After conviction in a magistrates court the prosecutor will state whether the person convicted has any previous convictions. If he has, his record as shown on ZRP form 125 will be put to him: that is, the prosecutor will read them out to the accused and the court will ask the accused if he admits them. If the accused denies any or all of them the prosecutor has the right to request a remand so that he can bring evidence to prove them.<sup>5</sup>

In the High Court the procedure is the same (note that there is no longer provision in the Criminal Procedure and Evidence Act for previous convictions to be proved at a preparatory examination), but if the prosecutor wishes to prove previous convictions he or she must give the accused at least 72 hours' notice of intention to do so.<sup>6</sup>

It is undesirable for the court to proceed to sentence an accused person on the basis of a general statement by the prosecutor that he has previous convictions and a general admission by the accused that he has a previous conviction for the crime concerned.<sup>7</sup> Particularly where the accused is unrepresented, the prosecutor should state precisely what the convictions are, and those convictions should be admitted or proved.

As regards the type of evidence which can be produced to establish previous convictions, see sections 328-329 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. A certified fingerprint record from a police officer, a prison officer or an immigration officer is admissible as *prima facie* evidence against the accused in relation to previous convictions.<sup>8</sup>

If the accused admits the previous convictions contained in the ZRP Form 125 this form becomes part of the record.

### ***Evidence on sentence***

Section 334(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] sets out the types of evidence and information which the court may receive for the purpose of informing itself as to the proper sentence to be passed. This includes:

- evidence on oath from the accused and his witnesses or from State witnesses;
- an unsworn statement from the accused;
- written statements from the prosecutor, the accused or his legal representative; and
- affidavits and written reports tendered by the prosecutor, the accused or his legal representative.

Hearsay evidence, affidavits and written statements may be tendered by one side only if the other side consents.<sup>9</sup> The court can decide to call the person who made any affidavit or written report submitted in evidence to give oral evidence.

Accused persons and witnesses who testify in relation to sentence are subject to cross-examination.

Generally the rules as to the admissibility of evidence are relaxed in relation to sentence.

---

<sup>5</sup> Section 327 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>6</sup> Section 326 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>7</sup> *S v McCormick* HB-56-90.

<sup>8</sup> Section 329 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>9</sup> Section 334(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

### **Order in which evidence is presented or addresses are made**

Where the prosecutor wishes to lead evidence in aggravation of sentence (including where he wants to prove previous convictions), he or she should do so before the accused leads evidence in mitigation of sentence. After that, the accused or his legal practitioner should lead any evidence he wishes to adduce in mitigation of sentence. Then the parties may address the court, first the prosecutor in aggravation of sentence and then the accused or his representative in mitigation.<sup>10</sup>

In practice, however, the parties seldom lead evidence in aggravation or mitigation. What usually happens is that the parties address the court (the prosecutor usually first, then the accused or his legal practitioner), stating aggravating or mitigating facts, sometimes putting forward propositions of law, and arguing for a particular sentence. If the prosecutor accepts the facts advanced by the accused or his representative, the prosecutor should say so and then they are accepted as correct without further proof.<sup>11</sup> If the court does not accept those facts despite the prosecutor having done so, the court must inform the parties before passing sentence so that the defence has an opportunity to lead evidence to establish them.<sup>12</sup> A prosecutor should not accept improbable facts alleged by the defence, unless he or she has good reason to believe them to be true, nor facts that are inconsistent with the evidence led at the trial.<sup>13</sup>

### **Unrepresented accused**

An unrepresented accused person must always be afforded the opportunity to lead mitigatory evidence and to address the court in mitigation of sentence.<sup>14</sup> His address can contain both assertions of fact and an appeal to the court for clemency. Additionally, where the accused is unrepresented the court has a duty to ensure that the factors of mitigation are fully canvassed because the accused will often be unaware of the sort of things which are relevant when it comes to sentence. The court must thus offer guidance to the accused in this regard.

The court itself should also investigate what mitigatory features exist and take into account mitigatory factors which have emerged in evidence before conviction. This is particularly so when the accused is a juvenile.<sup>15</sup>

If the police docket contains evidence of mitigating features the prosecutor has a duty to bring them to the attention of the court: *S v Le Roux* S-172-1981.

As indicated above, the court has a duty to make sure that it is in a position to arrive at a proper and just sentence. In order to arrive at such a sentence, the court must have as much factual information about the circumstances as possible. Unless those facts have emerged from the evidence at the trial, if an unrepresented accused does not say anything in mitigation, then the judicial officer should put such questions to the accused as will elicit that information. This applies particularly where the unrepresented accused is unsophisticated and has been convicted of a serious crime.<sup>16</sup>

---

<sup>10</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 25-9.

<sup>11</sup> *R v Hartley* 1966 RLR 522 (A).

<sup>12</sup> *R v Hartley* 1966 RLR 522 (A) at 526.

<sup>13</sup> *S v Ndebele* 1988 (2) ZLR 249 (H) at 256D-E.

<sup>14</sup> *S v Million & Ors* HH-53-92.

<sup>15</sup> *S v W* HH-276-83.

<sup>16</sup> *S v Mlilo* HB-27-88; *S v Mafu* HB-68-90

## Defended accused

The legal representative of the accused must be given the opportunity to lead mitigatory evidence to and address the court in mitigation of sentence. Without calling evidence, the legal representative may simply set out what he considers to be the salient mitigatory factors in the case, and may draw the court's attention to salient case law.<sup>17</sup> The prosecutor may either accept these facts or dispute them. However, as regards factors such as contrition, the court is likely to attach less weight to what a legal representative has said regarding his client's penitence than to a personal and credible expression of regret and repentance by the accused himself.

If the accused or his representative is not given an opportunity to address the court in mitigation of sentence, the sentence imposed by the court may have to be reconsidered on appeal or review.<sup>18</sup>

## Prosecutor

If the prosecutor wishes to do so, he must be allowed to address the court to draw attention to the aggravating features of the case and to make submissions as to the appropriate sentence in the case and to refer to any relevant case law in this regard.

The prosecutor's duty is to assist the court in arriving at a proper sentence. He or she should be able to advise what sentences are proper and what sentences have been approved by the High Court and the Supreme Court for similar crimes. He or she is duty bound to dispute facts advanced in mitigation if he or she knows them to be incorrect or if they are highly improbable or absurd. Where the accused is not legally represented, the prosecutor is also expected to draw the court's attention to any facts of which he or she is aware which are mitigatory, such as that the accused has paid compensation to his victim.

## **Onus of proof**

In *S v Chinyani* 1969 (2) RLR 42 (A), the court stated that there were no rigid rules governing the burden of proof or the degree of proof in relation to evidence or statements in mitigation of sentence. It said that a high degree of flexibility must exist in considering the variety of factors which are relevant to sentence; there need not always be proof of an assertion of fact before it is accepted for the purposes of sentence. If there is any doubt at the stage of sentence as to the existence of any relevant fact, the trial court must reach its own conclusions, as it thinks right, and is entitled to disregard any such fact for the purposes of sentence if it is not satisfied that the fact exists. Before rejecting any fact advanced in mitigation, however, the court should generally inform the accused or his representative.

## **Passing of sentence**

### **Sentence to be passed in open court**

Sentence must be passed in open court, where the accused is over the age of 18, unless the proceedings are *in camera*.<sup>19</sup>

---

<sup>17</sup> *S v Fusirayi* 1981 ZLR 56 (A) at 58.

<sup>18</sup> *R v Fedrew* 1956 R & N 47.

<sup>19</sup> Section 334(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Reid Rowland *Criminal Procedure in Zimbabwe* at p 25-11 suggests that even where the proceedings have been held *in camera*, the sentence may have to be delivered in open court, except in the case of juveniles.

Where sentence is to be pronounced on a person under the age of 18, the only people who may be present, apart from officers of the court, are: the accused and any co-accused, together with their spouses and legal practitioners; parents, guardians or persons *in loco parentis*; other persons whose presence is necessary to the proceedings (e.g. probation officers); and other people who have been authorised by the judicial officer to be present.<sup>20</sup>

### ***By whom sentence may be passed***

In the High Court, sentence should normally be passed “forthwith” by the judge who delivered the verdict; if it is not, then it may be passed by any judge of the court.<sup>21</sup>

In a magistrates court, sentence is normally passed forthwith by the magistrate who presided over the trial, but if for any reason that is not possible (e.g. if the original sentence has been set aside on review and it is necessary to pass sentence afresh) or in the absence of the magistrate who convicted the offender, any other magistrate of the court may impose sentence: section 334(7) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In order to use this provision, the sentencing magistrate must, firstly, note on the record the absence of the trial magistrate and the reasons for the absence. Secondly, the accused must be given the opportunity of addressing in mitigation. Finally, it is incumbent on the second magistrate to consider the evidence recorded and upon which the verdict was returned. The words “in the absence of the magistrate who convicted” are unqualified by the statute and should be given the widest possible meaning, which is that the magistrate in question could be absent for whatever reason, e.g. retirement, leave, discharge from service, death, or lengthy absence abroad for whatever reason. While these are normal forms of absence, there can be no doubt that any absence for an appreciable length of time would bring into play the provisions of the section, especially if prejudice were to be caused if the convicted person is made to await the return of the magistrate to the courthouse. Similarly, the fact that the trial magistrate is an appreciable distance away from the court would allow the provision to be invoked. The phrase must thus be measured in terms of the triad of time, space and circumstances.<sup>22</sup>

### ***Correction of sentence***

A judicial officer may correct a sentence either before or immediately after it has been recorded,<sup>23</sup> so long as there has been a genuine mistake in the delivery of the sentence (e.g. it does not reflect what the judicial officer meant or it is incompetent) and that the correction is made immediately, i.e. within a reasonable time.<sup>24</sup>

It is not every mistake that can be corrected. A judicial officer may correct a sentence if, for example, he intended to impose a sentence of six weeks’ imprisonment and discovers immediately afterwards that he erroneously recorded a sentence of six months’ imprisonment.<sup>25</sup> But if he imposed a competent sentence and then merely has second thoughts about it, he cannot change it because he is *functus officio*. For example, if a magistrate has imposed a prison sentence on a first offender and some time later decides that the offender should not be sent to prison after all but should instead be sentenced to a fine or community

---

<sup>20</sup> Section 334(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>21</sup> Section 333 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>22</sup> *S v Manga* 2006 (2) ZLR 304 (H).

<sup>23</sup> Section 201(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>24</sup> *R v Sikumbozo* 1967 RLR 348 (A).

<sup>25</sup> *R v Sikumbuzo* 1967 (4) SA 602 (RA).

service, the magistrate cannot alter the sentence.<sup>26</sup> And if a magistrate has imposed a fine for cycle theft, he cannot later decide that the sentence was too lenient and alter it to a prison sentence.<sup>27</sup>

### **Sentencing for untried crimes**

An accused person may apply to the court to be sentenced for untried crimes, and with the prosecutor's consent the court may do so as if the crimes had been separately charged.<sup>28</sup> The court must be satisfied that the accused freely and voluntarily admits to having committed the crimes. A magistrate can pass sentence on the accused even if the crimes concerned were committed outside his or her province.<sup>29</sup> The court must record the date, place and nature of each crime and the sentence imposed in respect of it.

Where sentence is imposed for such a crime, the accused is deemed to have been convicted of it and generally cannot be charged with it again; though if the conviction for the crime of which the accused was convicted is set aside on appeal or review then the accused can be charged again with the untried crimes.

### **Adjournment of case where sentence exceeding magistrate's jurisdiction is justified**

If, after conviction, a magistrate forms the opinion that a sentence in excess of his or her jurisdiction is warranted, he should adjourn the case, remand the accused and submit a report to the Prosecutor-General, together with a copy of the record of the proceedings.<sup>30</sup>

Where a magistrate has taken this step, the Prosecutor-General may direct either that the case be transferred to the High Court for sentence, or that it be continued before the magistrate.<sup>31</sup> On receiving the Prosecutor-General's direction, the magistrate must cause the accused to be informed of it.

### **Transfer to High Court for sentence**

Where the Prosecutor-General has directed that the case be transferred to the High Court for sentence, the magistrate must issue a warrant committing the accused to prison pending the imposition of sentence (though the accused can be admitted to bail) and send the record of the case to the High Court.<sup>32</sup> On receiving the record the registrar of the High Court must lay it before a judge, who must consider the verdict and any finding the magistrate may have come to in regard to the accused's previous convictions. In other words, the judge must review the proceedings. If the judge considers the proceedings to be in accordance with real and substantial justice, the accused will be brought before the judge in open court and sentenced either for the crime of which he was convicted or for any other crime that the judge may have substituted in the exercise of his or her review powers.<sup>33</sup> The judge

---

<sup>26</sup> *S v Chikumbirike* HH-307-84.

<sup>27</sup> *S v Nyamufarira* HH-335-83.

<sup>28</sup> Section 335 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>29</sup> Section 335(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>30</sup> Section 54(2) of the Magistrates Court Act [*Chapter 7:10*]. The magistrate should note on the record why he or she is taking this step, and inform the accused of the reasons, so that the accused can make proper representations on sentence: *S v Julieta & Anor* 1998 (1) ZLR 432 (S).

<sup>31</sup> Section 225(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>32</sup> Section 226(c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>33</sup> Section 227(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

can impose any appropriate sentence and is not limited by the jurisdictional limits that applied to the trial magistrate.

### Remittal to trial magistrate

If the Prosecutor-General remits the case back to the trial magistrate, the accused will be brought before the magistrate and sentenced. Note that if the Prosecutor-General takes this course and the magistrate is an ordinary (or junior) magistrate, the magistrate's jurisdiction to impose punishment is increased to a maximum of a fine of level 9<sup>34</sup> or four years' imprisonment or both.

## Penal provisions

All our crimes are now statutory (i.e. prescribed in statutes); there are no longer any common-law crimes. Statutes which create crimes almost invariably specify the maximum punishment that a court may impose, and sometimes they prescribe a minimum punishment as well. A court is not allowed to exceed the maximum punishment prescribed in the statute for the crime concerned. So even though it is said that the High Court has unlimited jurisdiction as to punishment, the court is not permitted to impose a heavier punishment than the relevant statute prescribes for the crime concerned: for example, if a statute prescribes a fine of level 9 or imprisonment for three years as the maximum sentence for a crime, the High Court cannot impose a sentence of four years' imprisonment for that crime. In addition, a magistrates court is not allowed to impose a punishment that exceeds its jurisdiction, so, in the example just mentioned, where a statute prescribes a fine of level 9 or imprisonment for three years as the maximum sentence for a crime, an ordinary magistrate will not be able to impose that maximum (because an ordinary magistrate's jurisdiction is limited to a fine of level 7 or two years' imprisonment).

If a statutory provision states that a person who contravenes the provision is liable to a fine not exceeding level X or to imprisonment for a period not exceeding Y years, the court has a discretion to impose either a fine or imprisonment, but not both. It may not, for example, impose imprisonment directly and as an alternative to a fine,<sup>35</sup> nor may it impose a fine and a suspended sentence of imprisonment.<sup>36</sup> That is why most statutes imposing penalties empower a court to impose "a fine not exceeding level X or imprisonment for a period not exceeding Y years or both such fine and such imprisonment."

## Forms of sentence

### General

Under section 336 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the following punishments are legally recognised in Zimbabwe:

- the death sentence (capital punishment);
- imprisonment, including imprisonment for life and extended imprisonment;
- a fine;
- community service;
- putting the convicted person under recognizance, with conditions.

---

<sup>34</sup> Currently US \$1 600.

<sup>35</sup> *S v Arends* 1988 (4) SA 792 (E) at 794I.

<sup>36</sup> *S v Sailas* 1978 RLR 400 (G).

## **Death sentence**

The death sentence is permitted under the Constitution<sup>37</sup> and is carried out by hanging.<sup>38</sup>

Under section 48 of the Constitution, echoed by section 336(1)(a) of the Criminal Procedure and Evidence Act, the death sentence can be imposed only for murder committed in aggravating circumstances — there is no indication in the Constitution what is meant by “aggravating circumstances”, so its meaning should be worked out by the courts on a case-by-case basis. Section 47(2) of the Criminal Law Code, however, purports to set out factors which a court must (“shall”) regard as aggravating: for example if the murder was committed in the course of rape or sexual assault, or was one of two or more committed in the same episode, or if the murder was accompanied by physical torture. This section, to the extent that it tries to compel courts to regard certain factors as aggravating, is almost certainly unconstitutional.

The sentence cannot be imposed on women, or on men below the age of 21 years or over the age of 70 years.<sup>39</sup>

Provisions of the Criminal Law Code which allow the death sentence to be imposed for treason<sup>40</sup> or for insurgency, banditry, sabotage or terrorism (where the crime results in the death of a person)<sup>41</sup> are unconstitutional.

No executions have been carried out in Zimbabwe since 2005, and Zimbabwe is regarded internationally as a country which has placed a moratorium on the death penalty. Unfortunately people have continued to be sentenced to death and there has been a build-up of prisoners awaiting execution: as at 2017 one man was on “Death Row” for over 25 years. Then in March 2018 the President published Clemency Order No. 1 of 2018<sup>42</sup> which commuted to life imprisonment the death sentences of all prisoners who had been on “Death Row” for ten years and more. Undue delay in executing a prisoner who has been sentenced to death amounts to cruel and inhuman treatment and it is submitted that if a prisoner is kept on “Death Row” for even five years it can legitimately be claimed that he has been treated cruelly and inhumanly.<sup>43</sup>

## **Imprisonment**

It is generally recognised that offenders should be kept out of prison as far as possible, particularly if they are first offenders. It has been said that imprisonment should be imposed

---

<sup>37</sup> Section 48 of the Constitution. There has been a *de facto* stay on executions since 2005, though the courts continue to impose the death penalty and no amnesty has been granted to prisoners awaiting execution. Some prisoners have been on “death row” awaiting execution for horrifying periods: one man for 24 years, one woman for just under 14 years.

<sup>38</sup> Section 339 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>39</sup> Section 48(2)(c) of the Constitution and section 338 of the Criminal Procedure and Evidence Act.

<sup>40</sup> Section 20 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

<sup>41</sup> Section 23(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

<sup>42</sup> Published in General Notice 164 of 2018 on the 10th March 2018.

<sup>43</sup> *Catholic Commission for Justice & Peace in Zimbabwe v Attorney-General, Zimbabwe, & Ors* 1993 (1) ZLR 242 (S) and *Woods & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1993 (2) ZLR 443 (S).

only as a last resort.<sup>44</sup> But sometimes, because of the seriousness of the crime, prison is the only option. For some crimes, only imprisonment can be imposed.<sup>45</sup>

Imprisonment is a means of removing dangerous persons from society, but it has disadvantages:

- It is very expensive to keep prisoners in custody.
- Contact with hardened criminals in prison makes an offender's rehabilitation difficult.

Young offenders (i.e. offenders in the age-group 18 to 21) should be kept out of prison where possible.<sup>46</sup> There are special provisions for the treatment of juvenile offenders (i.e. offenders below the age of 18). First offenders are normally treated with a measure of leniency.<sup>47</sup>

### Court's discretion as to period of imprisonment

Where a statute provides that the maximum sentence for a crime is imprisonment for life, or imprisonment for a specified period, the court can sentence the offender to a shorter period within the limit of the court's sentencing jurisdiction.<sup>48</sup> Where however a statute provides for a minimum sentence of imprisonment, the court may not pass a shorter sentence,<sup>49</sup> nor may it suspend any part of the sentence.<sup>50</sup>

A magistrates court cannot pass a sentence of imprisonment of less than four days, except where it sentences a person to imprisonment until the rising of the court.<sup>51</sup>

A sentence of imprisonment cannot be pre-dated to take into account any period that an offender has been detained before his trial.<sup>52</sup> But the courts usually take pre-trial incarceration into account when fixing the length of a sentence of imprisonment.

### Imprisonment for life

According to section 344A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], where a court sentences a person to imprisonment for life the person must be imprisoned for the rest of his or her life. The section is unconstitutional, because imprisoning a person without hope of release violates human dignity and amounts to cruel and inhuman punishment.<sup>53</sup> What life imprisonment means, therefore, is that the prisoner is kept in prison indefinitely but is entitled to be considered for release on parole in terms of the Prisons Act.

### Periodical imprisonment

Where a person is convicted of a crime specified in the Sixth Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] (certain traffic crimes and failing to pay mainte-

---

<sup>44</sup> *S v Mpofo* (2) 1985 (1) ZLR 285 (H).

<sup>45</sup> For example, subverting constitutional government (section 22 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and recruiting or training insurgents, bandits, saboteurs or terrorists (section 24 of that Act).

<sup>46</sup> See for example, *S v Mantwana* S-20-82.

<sup>47</sup> *S v Mpofo* (2) 1985 (1) ZLR 285 (H).

<sup>48</sup> Section 344 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>49</sup> Section 344(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>50</sup> Paragraph 3 of the Eighth Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>51</sup> Section 359 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>52</sup> *S v Nkomonde* 1993 (2) SACR 597 (W).

<sup>53</sup> *Makoni v Commissioner of Prisons & Anor* 2016 (2) ZLR 196 (CC).

nance) he may be sentenced to periodical imprisonment in an appropriate prison for a period of between 96 and 2000 hours.<sup>54</sup> Before imposing such a sentence the court must ascertain from the officer that there is accommodation for the offender in an appropriate prison.

Periodical imprisonment is intended to cater for offenders who should be sentenced to imprisonment but who ought to be allowed to continue to work and support their families while serving their sentences. It is intended for offenders who are in regular employment.

The way in which sentences of periodical imprisonment are to be served is laid down in the Prisons (General) Regulations, 1996 (SI 1 of 1996). What happens is that the offenders have to report to the prison every evening during their sentences and are released the following morning.

### Extended imprisonment (formerly indeterminate imprisonment of habitual criminals)

A judge may sentence an offender to extended imprisonment where the offender:

- is convicted of a crime in the Seventh Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] (which specifies serious crimes such as murder, rape, robbery, theft and fraud); and
- has previously been convicted in at least three separate trials of a Seventh Schedule crime; and
- was at least 25 years old when he sustained the last of those convictions.<sup>55</sup>

Before a person is sentenced to extended imprisonment he should be warned of the possibility that he may be so sentenced, but a warning is not a prerequisite for such a sentence to be imposed.<sup>56</sup> Where such a warning is given, it is noted on the record.

A sentence of extended imprisonment lasts from seven to 15 years, where the offender has not previously been sentenced to extended imprisonment, and from 15 to 20 years where he has. When sentencing the offender, the judge must inform him of the minimum and maximum periods he will have to serve.<sup>57</sup>

### Imprisonment in default of payment of a fine

Whenever an offender is sentenced to a fine, the court may impose a period of imprisonment as an alternative to the fine. The imprisonment can be of any length up to the court's limit of jurisdiction,<sup>58</sup> but it should not, either alone or together with any sentence of imprisonment imposed as a direct punishment, exceed the maximum period provided by the statute concerned for the crime.<sup>59</sup> The ratio between the fine and the imprisonment is in the discretion of the sentencing court, but a due proportion should be observed between the two. The imprisonment should be long enough to induce the offender to pay the fine, but it should not be excessive.<sup>60</sup> It has been said that the period of imprisonment should generally be roughly the period the offender takes to earn the fine.<sup>61</sup>

---

<sup>54</sup> Section 345 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>55</sup> Section 346 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>56</sup> *S v Moyo* 1981 ZLR 222 (G); *S v Wayi* 1994 (2) SACR 334 (E).

<sup>57</sup> Section 346(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>58</sup> Section 347(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>59</sup> *S v Taba* 1996 (1) ZLR 309 (H).

<sup>60</sup> *S v Nyati* 1972 (2) RLR 215 (G).

<sup>61</sup> *S v Nyirenda* 1988 (1) ZLR 160 (H).

## Remission of sentence

Under section 109 of the Prisons Act [*Chapter 7:11*], prisoners can earn remission of up to one-third of their sentences “through satisfactory industry and good conduct”. In other words, if they behave themselves in prison they will be released early. This does not apply to prisoners serving sentences of one month or less, or to prisoners who have been sentenced to life imprisonment,<sup>62</sup> periodical imprisonment or extended imprisonment. And it does not apply if the remission would result in the prisoner serving less than one month’s imprisonment.

## **Fine**

Fines are an important alternative to imprisonment. A fine can be an effective deterrent and it does not have the highly destructive consequences that incarceration often has. However, the way in which fines are imposed can be highly discriminatory against the poor. As was pointed out in the case of *S v Munyakwe & Ors* HH-92-93, the failure to assess fines in accordance with means can result in grave injustice to poorer people.

## Assessment of offender’s ability to pay fine

Time and time again, the higher courts have stressed that there should be a proper investigation into the means of the accused to pay and that the fine should be tailored to his means. Unless judicial officers gather adequate information on the means of the accused, it will be impossible for them to tailor the fine to the means of the accused. In probing the means of the accused, earnings from the informal sector should be taken into account because large numbers of the urban population now earn their livelihood in the informal sector.

The main principles to be borne in mind in assessing the amount of a fine are as follows:

- The object of a fine is to keep the offender out of prison, and that object will be defeated if a fine is imposed which there is no reason to suppose the accused can pay. The fine must be a real alternative to the sentence of imprisonment imposed in default of payment.
- The fine should be adjusted to the accused’s means, though not necessarily his immediate means: his financial prospects must be taken into account and, where necessary he may be given time to pay the fine. If the accused is a poor person, the fine should be lower than if he is rich. And if he is rich, there is no reason why an upward adjustment of the normal fine should not be made.<sup>63</sup> At the same time, care must be taken to ensure that the wealthy are not unduly punished.
- Even if the court has reason to believe that any fine is beyond the means of the offender, a fine may still be imposed; in such a case it would be proper to impose a fine commensurate with the rough average earnings of a person in a similar position to the offender.<sup>64</sup>

---

<sup>62</sup> But prisoners sentenced to life imprisonment are eligible to early release through parole: see *Makoni v Commissioner of Prisons & Anor* 2016 (2) ZLR 196 (CC).

<sup>63</sup> See *S v Ntlele* 1993 (2) SACR 610 (W), where it was pointed out that equality before the law means that justice must be even-handed. When a fine is imposed on a rich offender which he can pay out of one day’s earnings and the same fine is imposed for the same crime on a poor offender who can pay it only after he has toiled for 60 days, then the requirements of even-handedness are manifestly not met.

<sup>64</sup> *S v Moyo* 1984 (1) ZLR 74 (H).

- A fine should be assessed on the basis of the offender's ability to pay, not on the ability of his family or friends to pay. Otherwise his family and friends will be punished for his crime.<sup>65</sup>
- Where the offender has been convicted of a crime which involves making money by illegal means, such as unlawfully dealing in gold, the amount of any fine imposed must be such as to deprive the offender of his profit.<sup>66</sup>

### Recovery of fines

The court may enforce the payment of a fine by ordering the seizure of money which the offender has in his possession. This is seldom done. Instead the court may issue a warrant authorising the sheriff or messenger of court to attach the offender's property and sell it.<sup>67</sup> Alternatively, the court may issue a garnishee order directing the offender's employer to deduct specified amounts from the offender's salary or wages and to pay them to the registrar or clerk of court.<sup>68</sup>

The purpose of these provisions is to exact payment of a fine from a person who is able to pay but refuses to do so, insisting on going to prison in order to make a martyr of himself and a be nuisance to the State. The provisions can also be used where the offender has been sentenced to an effective term of imprisonment as well as a fine.

### Part payment of fine

If an offender pays part of a fine, the period of imprisonment imposed as an alternative to the fine is reduced accordingly. The reduction must be in whole days, and any payment that would reduce the period by a fraction of a day must not be accepted.<sup>69</sup>

### Time to pay fine

A court that sentences an offender to a fine may give him up to 12 months in which to pay the fine. This is done by suspending the warrant committing the offender to prison in default of payment. Conditions may be imposed on the suspension of the warrant. The court may allow the fine to be paid in instalments.<sup>70</sup>

Generally, whenever the court imposes a fine on an unrepresented offender, it should investigate the question whether or not he should be given time to pay, even in the absence of an application from the offender.<sup>71</sup>

### **Community service**

Community service consists of any service for the benefit of the community or a section of the community which an offender is ordered to provide in terms of section 347, 350A or 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

---

<sup>65</sup> *S v Ndhlovu* 1971 (1) RLR 104 (G).

<sup>66</sup> *S v Manwere* 1972 (2) RLR 139 (A) at 145F.

<sup>67</sup> Section 348(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Only movable property may be attached and sold in the first instance, but if the sale does not realize enough to pay the fine, the High Court or the magistrate (if authorized by a judge) may issue a warrant for the attachment of the offender's immovable property.

<sup>68</sup> Section 349 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>69</sup> Section 348A of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>70</sup> Section 358(2)(c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>71</sup> *S v Nyirenda* 1988 (1) ZLR 160 (H).

It may be imposed:

- as an alternative to a fine;
- as a condition of suspension of a sentence of imprisonment; or
- directly as a substantive punishment.

It provides an alternative to imprisonment and is particularly beneficial for first and youthful offenders. The offender is not only kept out of prison where he would come into contact with the worst elements in society but he is also made to pay reparation for his wrongs to society. It can be an exacting form of punishment and is not intended to be an easy way out for convicted persons.

Details as to the imposition of community service are contained in the Criminal Procedure and Evidence (Community Service) Regulations, 1998 (SI 12 of 1998).

### Crimes for which community service may be imposed

Community service may be imposed in respect of less serious crimes, i.e. crimes in which the court would have imposed an effective prison sentence of 24 months or less<sup>72</sup>; according to the Community Service Guidelines, anyone who would otherwise be sentenced to an effective prison sentence of 12 months or less is eligible for community service. Failure by a court to consider imposing community service in suitable cases is a misdirection.<sup>73</sup> It may be imposed even if the enactment which creates the crime concerned makes no provision for community service.<sup>74</sup> It may not be imposed in cases of murder, rape, armed robbery, robbery with violence, car theft, stock theft (of cattle). Special caution must be exercised in imposing community service for crimes such as unarmed robbery, culpable homicide, infanticide, abortion, corruption involving public officers, etc. Only where the mitigatory circumstances are very compelling should community service be considered for those crimes.

### Inquiry before imposition of community service

The court must make a proper enquiry before imposing community service,<sup>75</sup> and should consider the following:

- It should be regarded as a fine on leisure time and is particularly appropriate for persons who exhibit anti-social behaviour, as it gives the opportunity for constructive activity as well as a possible change of outlook on the part of the offender.
- Even if the crime is one for which community service is appropriate, the offender may not be: he may indicate unwillingness to carry out the service; he may fail to attend, requiring a warrant of arrest to be issued; or he may commit further crimes. For these reasons, courts should err on the side of caution for, if inappropriate offenders are allowed the option of community service, or if it is imposed for inappropriate crimes, public confidence in the system will be lost.
- Is a suitable place available? If so, where? If the offender possesses particular skills or expertise, he may be ordered to perform community service where those skills and expertise can be used to good advantage (for example, a doctor can be ordered to perform community service at a local clinic or hospital).

---

<sup>72</sup> *S v Shariwa* 2003 (1) ZLR 314 (H) at 322F; *S v Gumede* 2003 (1) ZLR 408 (H) at 410C.

<sup>73</sup> *S v Shariwa* 2003 (1) ZLR 314 (H).

<sup>74</sup> Section 350A(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>75</sup> *S v Chinzenze* 1998 (1) ZLR 470 (H) at 477E-F and *S v Gumbo* 1995 (1) ZLR 163 (H) at 168C-E.

- Is the work suitable for making reparation to the community? The work should not be such that it is demeaning and amounts to degrading treatment, but on the other hand should not be so easy that it appears to be meaningless.
- If the offender is employed, can community service be arranged so as to enable him to continue in employment? Special care should be taken to ensure that the community service does not interfere with his employment (e.g. he may be ordered to carry out community service after normal working hours or on weekends).
- The recommendations of the community service officers. In *S v Banda* 2004 (1) ZLR 493 (H), the judge pointed out that community service officers are trained officers of the court whose main function is to assess the suitability of a candidate for community service. Their recommendations should not be disregarded without good cause. If a recommendation is not accepted, it is essential that the trial court show that it considered the recommendation and why it ignored it. Failure to do so is a misdirection.

### Consent of offender

In terms of section 12 of the Criminal Procedure and Evidence (Community Service) Regulations, 1998 (SI 12 of 1998), a court is required to do the following:

- Explain to the offender
  - the aims and objectives of community service;
  - his duties in terms of the order;
  - his right to apply for variation of the order;
  - the consequences of his failing to comply with the order; and
- Ascertain whether the offender is willing to perform community service.

If the offender refuses to perform community service after this explanation, it should not be imposed in any form.

### Imposition of community service

Community service is measured in hours of service. The minimum length is 35 hours (meaning that a sentence of less than 35 hours should only be imposed in exceptional cases); the maximum will depend on the circumstances of the case, but should generally not exceed 420 hours. The number of hours should not be chosen arbitrarily.

The court must specify the hours of work and the times of starting and ending work, and should have regard to the offender's circumstances — e.g. is he a full-time student or in full-time employment?<sup>76</sup> If he is, the court should allow community service to be carried out over week-ends or after working hours, by arrangement with the institution concerned. If the hours fixed by the court become inconvenient either to the institution or to the offender, then the court must be approached to vary the conditions imposed in the order. It is not for the institution to allow the offender time off.

Where community service is imposed as an alternative to a fine, it should only be imposed where the appropriate sentence is a fine and there is doubt whether the offender will be able to pay the fine even if it is reduced to take account of his means or if he is given time to pay. Community service could be imposed directly where the court does not wish the offender to go to prison or to pay a fine, for example, where the fine might be paid by some-

---

<sup>76</sup> *S v Sithole & Anor* 2003 (2) ZLR 1 (H).

one else or where a fine would have little deterrent effect but imprisonment would be inappropriate.

#### Amendment of community service order

In terms of section 350D of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a community service order can be amended or revoked by the same judicial officer who imposed it or by a judicial officer of the same or greater jurisdiction. An application for amendment or revocation can be made by the offender or, if he is a minor, by his parent or guardian, or by the Prosecutor-General or a public prosecutor.

#### Failure to comply with community service order

If an offender fails to comply with a community service order, a magistrate can order him to be arrested and brought before the High Court (where the order was imposed by that court) or before a magistrates court, where the court will undertake an enquiry into the default. If the court is satisfied that the offender has failed to comply with the order, it may:

- amend or extend the order;
- order the offender to pay a fine or serve any sentence of imprisonment that was imposed on him as an alternative to community service; or
- if no alternative punishment was imposed on the offender, impose any sentence on him that could have been imposed by the original trial court.

#### **Corporal punishment**

Section 353 of the Criminal Procedure and Evidence Act permits corporal punishment (i.e. a whipping of up to six strokes) to be imposed on boys under the age of 18 who have been convicted of any crime.

Corporal punishment, whether imposed on juveniles or adults, is an unconstitutional form of punishment, and section 353 is therefore void: see the case of *S v Chokuramba* CCZ 10/2019.

#### **Putting the offender under recognizances (binding a person over to keep the peace)**

Where the High Court has convicted a person of a crime, other than a capital crime<sup>77</sup>, it may order him to enter into recognizances, with or without sureties, in an amount fixed by the court. The court may make such an order in addition to, or as an alternative to, any other punishment it may impose on the convicted person. The condition of the recognizance is that the offender will keep the peace and be of good behaviour for the time fixed by the court.<sup>78</sup>

A magistrate has similar powers, where an offender has been convicted of a crime involving assault or injury to the person, but the amount of the recognizances must not exceed level 6 and the period for which the offender is bound must not exceed one year.<sup>79</sup>

If a person fails to observe the conditions of recognizances he has entered into, a magistrate may order him to be brought before a judge or magistrate (depending on which court im-

---

<sup>77</sup> That is, a crime for which the death penalty may be imposed — which now means murder committed in aggravating circumstances.

<sup>78</sup> Section 354(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>79</sup> Section 354(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

posed the recognizances). A peace officer who believes that a person has failed to observe the conditions of his recognizances may arrest him without warrant in order to bring him before a judge or magistrate. A judge or magistrate before whom a person has been brought may enquire into the matter and declare the recognizances to be forfeited.<sup>80</sup>

### **Caution and discharge**

This is not really a punishment. It can be imposed by a court for any crime except one listed in the Eighth Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] (i.e. murder, or conspiracy or incitement to commit murder, or a crime for which a mandatory minimum sentence is imposable).<sup>81</sup>

A caution and discharge is generally regarded as an acquittal, except that the Prosecutor-General is entitled to appeal against the sentence.<sup>82</sup>

### **Mandatory minimum sentences**

Several statutes provide for mandatory minimum sentences.<sup>83</sup> Where such sentences are provided, the court's general discretion to impose a lesser sentence is removed.<sup>84</sup>

Mandatory minimum sentences are constitutional so long as:

- The minimum sentence is not grossly disproportionate to the crime, having regard to its nature and the mischief which is sought to be remedied; and
- The sentence can be mitigated by a finding that special circumstances exist which allow the court to impose a lesser punishment.<sup>85</sup>

A mandatory minimum sentence does not apply to attempts to commit the crime concerned, unless the statute specifically provides that it does apply.<sup>86</sup>

A mandatory minimum sentence cannot be suspended, and if it is a fine the offender cannot be given time to pay.<sup>87</sup>

### **Special circumstances or reasons**

For the reasons given above, most statutes imposing minimum sentences state that the sentences need not be imposed where there are "special circumstances" or "special reasons" not to do so. To qualify as special, a circumstance or reason must be out of the ordinary, though the court is entitled to take into account a cumulative effect of a number of circumstances or reasons. Mitigating features such as good character cannot be taken as special, nor does contrition or co-operation on the part of the offender.<sup>88</sup> In a case involving the illegal possession of precious stones, the fact that the stones have a minimal value does not

---

<sup>80</sup> Section 354 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>81</sup> Section 358(2)(d) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>82</sup> Section 62(2) of the Magistrates Court Act [*Chapter 7:10*].

<sup>83</sup> For example, section 80 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (rape, where the accused person is infected with HIV, and section 114 of that Act (stock theft).

<sup>84</sup> Section 344(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>85</sup> *S v Arab* 1990 (1) ZLR 253 (S).

<sup>86</sup> *S v Mapuranga* 1988 (1) ZLR 124 (S).

<sup>87</sup> Section 358(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as read with the Eighth Schedule to that Act; *S v de Montille* 1979 RLR 105 (G); *S v Kudavaranda* 1988 (2) ZLR 367 (H).

<sup>88</sup> *S v Mbewe & Ors* 1988 (1) ZLR 7 (H).

by itself amount to a special circumstance. Special circumstances or reasons may relate to the crime or the offender, unless the statute indicates the contrary — though most statutes define the phrase as “special circumstances (or reasons) surrounding the commission of the offence”, which excludes circumstances relating to the offender.

## Multiple counts

Where a person is convicted at one trial of two or more counts, the court may sentence him to punishment in respect of each count.<sup>89</sup>

### ***Cumulative or consecutive sentences***

Normally, when an offender is sentenced to separate punishments on two or more counts, the sentences must be served consecutively, i.e. one after the other. The court may direct the order in which the sentences will be served or, alternatively, may order that the sentences should run concurrently (i.e. that they should be served together).<sup>90</sup> Sentences of corporal punishment or of fines cannot, however, be made to run concurrently. It is not possible, for example, to sentence a juvenile to four strokes on one count and four strokes on another and order that the sentences run concurrently. The proper procedure to adopt where a number of crimes warranting corporal punishment or a fine are committed and the aggregate would be too severe, is to treat several counts as one for the purposes of sentence.

In fixing the length of each sentence, the court should take into account whether the sentence is going to be made consecutive to or concurrent with the other sentences. There is no requirement that the sentences on closely related counts should run concurrently with one another. The ultimate test is whether or not the aggregate sentence is reasonable in relation to the offender’s total culpability.<sup>91</sup> The overall sentence must always be borne in mind. Even if the sentences on individual counts, taken separately, are appropriate, the total sentence may not be. Where a person is convicted of several counts of varying degrees of gravity, it is wrong to assess an appropriate aggregate sentence and then divide it equally between the different counts. Inappropriate sentences should not be imposed on individual counts in order to arrive at an acceptable total. There are two alternative correct methods:

- One is to impose a globular sentence, i.e. treating all the counts as one for sentence.<sup>92</sup> This is not always desirable. It is preferable for an offender to be sentenced separately for each crime, especially where the crimes are entirely different. In most cases, there is no practical advantage in imposing a globular sentence. An exception might arise where it is decided, in dealing with a juvenile, to place him in a training institute or impose a sentence of whipping. The imposition of a globular sentence often causes difficulties on appeal or review. Consequently, one globular sentence for two or more crimes should only be considered where the crimes are of the same or a similar nature and are closely linked in time (or, if they are not closely linked in time, if they are of a similar nature and are part of a continuous course of conduct<sup>93</sup>). A common example would be charges of forging a document and using the document to perpetrate a fraud.

Where a magistrate takes counts as one for sentence, the globular sentence must be within his punitive jurisdiction.

---

<sup>89</sup> Section 343(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>90</sup> Section 343(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>91</sup> *R v Malela* 1967 RLR 359 (A).

<sup>92</sup> *S v Damba*; *S v Chanakira* 2004 (1) ZLR 296 (H); *S v Chawasirira* 1991 (1) ZLR 66 (H).

<sup>93</sup> *S v Damba*; *S v Chanakira*, *supra*.

Where additional punishments – such as prohibition from driving or forfeiture of goods – are provided for in respect of one of the counts on which the accused was convicted, the fact that all the counts are treated as one for sentence does not take away the right of the court to impose the additional punishment for that one count. However, the court should make it clear that the subsidiary punishment relates only to a particular count.

- The other is to impose an adequate and appropriate sentence on each count separately. If the total period is too high, the sentence, or part of it, on one count should be ordered to run concurrently with the sentence on another count; or a portion of the total may be suspended.<sup>94</sup>

It may be appropriate to group related counts together and make the sentences on the counts within each group run concurrently. But where counts are grouped together, there should be some rational basis for doing so.<sup>95</sup>

Where counts are treated separately for the purposes of sentence (even if they are made to run concurrently), a magistrate may impose any proper sentence in respect of each count which is within the limits of his or her punitive jurisdiction, even though the total sentence may be in excess of that jurisdiction.<sup>96</sup> But, as pointed out already, the magistrate must bear in mind that the overall sentence should appropriately reflect the offender's culpability.

## Sentencing guidelines

Inconsistency in sentencing — i.e. courts imposing widely different sentences for similar crimes — will always be a problem so long as judges and magistrates are given a broad discretion as to sentence. So too will the problem of inadequate or unduly harsh sentences, because judges and magistrates, being human, will differ in their assessment of the seriousness of different crimes and in their assessment of mitigating and aggravating factors.

In order to mitigate both these problems, the Criminal Procedure and Evidence Act now provides<sup>97</sup> for conferences to be convened by the Judicial Service Commission in order to discuss the objectives, policies, standards and criteria for sentencing offenders and formulating sentencing guidelines. The conferences will bring together judges, magistrates, the National Prosecuting Authority, the Police, the Prison Service, the Law Society and other interested parties and experts.

Sentencing guidelines may deal with:

- pre-sentencing investigations;
- factors to be considered when imposing sentence;
- forms of punishment to be imposed as alternatives to imprisonment;
- principles and criteria to promote consistency in sentencing.

In formulating sentencing guidelines, conferences will have to pay regard to:

- the need for consistency in sentencing;
- the impact of sentences on offenders and their families as well as on victims;
- the need for public confidence in the criminal justice system;

---

<sup>94</sup> *S v Banda* 1984 (1) ZLR 96 (H).

<sup>95</sup> *S v Sawyer* 1999 (2) ZLR 390 (H).

<sup>96</sup> Section 50 of the Magistrates Court Act [*Chapter 7:10*].

<sup>97</sup> In section 334A.

- the cost of different sentences and their relative effectiveness.

Sentencing guidelines will normally take the form of tables of “presumptive penalties”, i.e. penalties which are midway between augmented penalties that may be imposed where there are aggravating circumstances in a case, and diminished penalties that may be imposed where there are mitigating circumstances. These presumptive penalties may be supplemented by guidelines “addressing such of the factors referred to in subsection (5) [i.e. the factors that are bulleted above] as are relevant to each offence or class of offence.”<sup>98</sup>

Sentencing guidelines formulated by a conference will be subject to approval by the Judicial Service Commission which will send them to the Minister of Justice, Legal and Parliamentary Affairs for publication as regulations under the Criminal Procedure and Evidence Act. If the Minister has any objections to the guidelines he or she may refer them back to the Commission for reconsideration by the Commission or at the next conference. If the Commission agrees to modify them, the Minister will have to publish them as modified; if the Commission refuses to do so, then the Minister will have to publish them in their original form.

Courts will have to pay due regard to sentencing guidelines when they impose sentence on offenders, and though they are not bound to follow the guidelines if they depart from them they must record their reasons for doing so.<sup>99</sup>

### **Suspension or postponement of sentence**

Where a person is convicted of a crime other than one specified in the Eighth Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] (i.e. murder or a crime for which a mandatory minimum sentence is prescribed, or a conspiracy, incitement or attempt to commit such a crime<sup>100</sup>), the court may:

- postpone the passing of sentence for up to five years and release the offender on such conditions as the court may specify; or
- pass sentence, but suspend the whole or part of it for up to five years on such conditions as the court may specify.<sup>101</sup>

The conditions that may be imposed are dealt with below.

#### ***General considerations as to suspension or postponement***

The purpose of a suspended or postponed sentence is rehabilitation and the court should be satisfied that a suspended portion of the sentence will have a rehabilitative effect.<sup>102</sup>

There is no requirement that a first offender should receive a totally suspended sentence. Whether a totally suspended sentence is appropriate or not will depend on all the circumstances. In the case of a young first offender, for example, a suspended sentence is usually desirable and appropriate.<sup>103</sup>

---

<sup>98</sup> Section 334A(7) of the Criminal Procedure and Evidence Act. It is not clear what the quoted words mean.

<sup>99</sup> Section 334A(9) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>100</sup> Though for some reason attempted murder is not included in the Eighth Schedule, so an offender can be sentenced to a suspended sentence if he attempts to commit murder but not if he conspires with or incites another person to commit the crime.

<sup>101</sup> Section 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>102</sup> *S v Gorogodo* 1988 (2) ZLR 378 (S).

<sup>103</sup> *S v Chirara & Ors* 1990 (2) ZLR 156 (H).

There is no general rule that before a court may impose a suspended sentence, whether total or partial, it must be satisfied that special or exceptional circumstances exist. But if the appropriate sentence is an effective term of imprisonment, special circumstances would have to be shown before the court would be justified in wholly suspending the sentence.<sup>104</sup> Nor is there any rule that every first offender who is to be imprisoned is entitled to have a portion of the sentence suspended, though they usually do receive a partially suspended sentence.

Where a very long effective sentence of imprisonment is imposed, a suspended portion will generally serve little purpose<sup>105</sup>, though it is sometimes appropriate — for example, where the sentence is suspended on condition that the offender compensates the victim.

### ***Conditions of suspension or postponement***

Conditions on which a sentence may be suspended or postponed may relate to:

- good conduct;
- compensation for damage or loss caused by the offender;
- rendering some benefit or service to anyone injured by the crime;
- submission to instruction or treatment;
- submission to the supervision or control of a probation officer or other suitable person;
- compulsory attendance or residence at a specified centre for a specified purpose;
- any other matter which the court may specify, having regard to the interests of the offender or any other person or the general public.<sup>106</sup>

The conditions must be appropriate to the crime and must be stated with such precision that the offender clearly understands the ambit of the condition. If there is any doubt as to how a condition should be interpreted, the doubt must be resolved in favour of the offender. Thus, if the offender is convicted of a crime involving assault, it would be appropriate to suspend the sentence or a part of it on a condition relating to physical violence. The use of the word “violence” alone, however, may be vague and other wording may be needed to ensure that the offender knows exactly what he must do to avoid having the suspended sentence brought into operation. For example, “statutory rape” would probably not be a crime involving violence. Similarly, a condition that the offender does not commit any crime involving theft or dishonesty would not apply to unlawful entry into premises. It would only apply to crimes akin to theft.<sup>107</sup>

A condition of suspension must be reasonably capable of fulfilment; if the condition cannot be fulfilled, it should not be included.<sup>108</sup>

It is improper for a court to attach more than one condition to the suspension of a portion of a sentence. Where the offender is convicted of theft and it is desired to suspend a portion of the sentence on conditions of both restitution and subsequent good behaviour, it would be better to suspend a portion on condition of restitution and suspend a further portion on con-

---

<sup>104</sup> *S v Joelson* 1971 (1) RLR 214 (A).

<sup>105</sup> *S v Kanhukamwe* 1987 (1) ZLR 158 (S); *S v Sawyer* 1999 (2) ZLR 390 (H).

<sup>106</sup> Section 385(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>107</sup> *S v van Beek & Anor* 1971 (1) RLR 75 (G).

<sup>108</sup> *S v Manzini* 1984 (1) ZLR 33 (H).

dition of subsequent good behaviour.<sup>109</sup> Any other course could lead to complications. Similarly, it would be improper to impose a single suspended sentence in respect of two unrelated crimes.<sup>110</sup>

### ***Length of suspended sentence and period of suspension***

In assessing sentence, a portion of which is to be suspended, the proper approach is to look primarily at the sentence which the crime should attract and, having determined that, consider what portion should be suspended. It is not correct to decide what effective sentence the offender should undergo and then add a suspended sentence.

The period of suspension should also be considered judicially. The maximum period of suspension or postponement of sentence is five years<sup>111</sup> and there is a tendency for the courts automatically to suspend or postpone sentences for the maximum period. The court should determine in each case whether the maximum period is warranted.

### ***Bringing suspended sentence into effect***

If the offender breaches any of the conditions on which a sentence was suspended or postponed, the sentence may be brought into effect.

If the breach consists of a subsequent conviction, the prosecutor at the later trial should, having proved the offender's previous convictions, point out to the court that the offender has breached the condition and apply for the suspended sentence to be brought into effect or for sentence to be passed (where the sentence was postponed). The court should not act on its own initiative.<sup>112</sup>

If the breach does not consist of a subsequent conviction, it is normally the duty of the local public prosecutor to report to the magistrate that the offender has breached the conditions, though any other interested party may do so — e.g. the person supervising community service would have to report if the offender has failed to perform the service.

The magistrate to whom the matter is reported, or the court subsequently convicting the offender, should consider the following:

- whether the new crime was committed before the period of suspension expired; and
- if the period of suspension has not expired, whether the present crime amounts to a breach of the conditions of suspension.

### **Deciding whether period of suspension has expired**

A sentence may be suspended for up to five years. The period of suspension normally commences on the date that the accused was sentenced. If, however, only a portion of a prison sentence has been suspended and the accused has had to serve a term of imprisonment, the period of suspension only begins to run after the accused is released from prison after serving that term with or without remission of sentence. Evidence from the prison service of the date of release should be elicited where necessary.

Sentences are usually suspended on condition that the accused does not commit a particular type of crime during the period of suspension. In such a case, the vital question is whether he committed the crime during the period of suspension. If he did so, the fact that he is on-

---

<sup>109</sup> *S v Bajilla* 1981 ZLR 151 (A).

<sup>110</sup> *S v Ncube (1)* 1989 (2) ZLR 52 (H).

<sup>111</sup> Section 358(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>112</sup> *R v Dudzayi* 1963 R & N 728 (SR).

ly tried for the crime after the suspended sentence expired does not prevent the suspended sentence from being brought into operation.<sup>113</sup>

Sometimes sentences are suspended on condition that the accused is not convicted of a particular type of crime during the period of the suspension. Here the question will be whether or not the period of suspension had expired at the date when the accused was convicted of the current crime. Conditions of suspension should not be formulated in this way: conditions should be phrased so that the sentences are suspended on condition the offender does not commit (rather than is convicted of) a particular type of crime during the period of suspension.

### Deciding whether accused had breached conditions of suspension

The criminal action of the accused must constitute a breach of the conditions laid down for suspension of the previous sentence. If the condition was that he does not commit a crime of dishonesty during the period of suspension, the commission of the crime of negligent driving or assault, for example, will not amount to a breach of this condition.

### Suspended sentence imposed by High Court

A magistrate cannot bring into effect a suspended sentence imposed by the High Court.<sup>114</sup> After sentencing the accused for his current crime, the magistrate must proceed in terms of section 54(2) of the Magistrates Court Act [*Chapter 7:10*] and refer the case to the High Court so that the High Court can bring into effect the suspended sentence if it considers that it is appropriate to do so.

Where the suspended sentence was imposed by a magistrate, it does not have to be brought into operation by the magistrate who originally imposed it. A magistrate other than the magistrate who originally imposed it can bring into effect a suspended sentence.

### Passing of postponed sentence

Most of what is stated above relating to suspended sentences applies to situations where it emerges that previously the passing of sentence on the accused was conditionally postponed. The magistrate convicting and sentencing the accused for the current crime must also decide whether the accused must also now be sentenced for the previous crime because he has breached the conditions of the postponement within the period for which sentence was postponed. However, it must be noted that the period of postponement begins on the date of conviction.

As with suspension, a magistrate cannot pass sentence if the High Court postponed the passing of sentence. The case must be referred to the High Court.

A magistrate other than the magistrate who originally postponed sentence can pass sentence on the offender, but in such a case the sentencing magistrate should have the record of the previous proceedings before him. And his sentencing jurisdiction is limited to his own jurisdiction or that of the convicting magistrate, whichever is the lower.<sup>115</sup>

---

<sup>113</sup> *S v Deuss* 1972 (1) RLR 121 (G).

<sup>114</sup> Section 358(5) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; *S v Chitengu* 1980 ZLR 84 (G).

<sup>115</sup> Reid Rowland *Criminal Procedure in Zimbabwe* p. 25-53.

## Further suspension or postponement

It is open to a court to grant a further suspension or postponement for a further period not exceeding five years, on good cause shown by the offender, subject to such conditions as might have been imposed when the sentence was originally suspended or postponed.<sup>116</sup> What is good cause must be decided in the light of the circumstances of each case, but “good” means “sufficient” or “satisfactory”,<sup>117</sup> giving the court a wide discretion to consider factors relating to the offender and the crime.

## Reasons for Sentence

Courts should give reasons for the penalties they impose, and the reasons should record when sentence is pronounced. Full written reasons should be given even if the judicial officer thinks that the reasons for the sentence are obvious. It is particularly important that the judicial officer should record his reasons for departing from any general policy which has been laid down by the higher courts in respect of sentence. The imposition of an inappropriate sentence is an injustice and the review or appeal court can only determine the appropriateness of a sentence if the reasons for the sentence are given.<sup>118</sup>

## Factors affecting sentence

### **General approach to sentence**

#### The triad of factors

When assessing an appropriate sentence to impose, courts generally consider what in the South African case of *S v Zinn* 1969 (2) SA 537 (A) was called:

“[T]he triad consisting of the crime, the offender and the interests of society.”

As it was put by Holmes JA in the often-quoted case of *S v Sparks & Anor* 1972 (3) SA 396 (A) at 410H:

“Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy.”

So the three general guides in determining an appropriate sentence to impose are: the seriousness of the crime, the personal circumstances of the offender, and the public interest. These factors must be considered equally and no one of them should be ignored or over-emphasised at the expense of the others; they must be balanced with care and understanding.<sup>119</sup>

#### *1. The crime*

Punishment must not be disproportionate to the crime; this is a constitutional requirement, laid down by section 53 of the Constitution which prohibits cruel, inhuman or degrading punishment.<sup>120</sup> The proportionality of the punishment imposed in any particular case is ascertained by looking at the seriousness of the crime and the aggravating and mitigating circumstances relating to it. Some crimes are inherently more serious than others: for exam-

---

<sup>116</sup> Section 358(7)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>117</sup> *R v Montgomery* 1969 (2) RLR 294 (A).

<sup>118</sup> *S v Duri* HH-89-91; *S v Nyamupanda* HH-101-91.

<sup>119</sup> *S v Holder* 1979 (2) SA 70 (A).

<sup>120</sup> *S v Arab* 1990 (1) ZLR 253 (S) at 260.

ple, murder or rape are inherently more serious than, say, driving a motor vehicle without due care and attention. As to the aggravating features, these will vary from case to case. If the crime is one of possessing dangerous drugs, an aggravating factor may be the amount of the drugs involved. If the crime involves violence, aggravating factors may be the extent of the violence, the brutality of the attack, and the helplessness of the victim. Other aggravating factors applicable to this leg of the triad may include the fact that the crime was planned or that it was committed by a criminal gang.

Mitigating factors with regard to the first leg of the triad may include, for example, that the offender was convicted only of an attempt rather than of a completed crime, or that the crime was petty, or that the offender's involvement in it was limited.

## 2. *The offender*

The second element of the triad entails considering the offender's personal circumstances to ensure that the sentence fits the offender. Aggravating features in this regard would be, for example: that the accused is a repeat offender, that he was motivated by greed, that he lacked remorse, that he committed the crime by abusing a position of trust. Mitigating factors would include: youth, old age, and the fact that he is a first offender. Other factors to be considered are: ill health, gainful employment, the fact that the offender has a family or that he has shown remorse and pleaded guilty, and so on.

## 3. *The interests of the public*

Considerations under this head include the traditional purposes of punishment (deterrence, rehabilitation, protection, and retribution). It can also be interpreted more widely to include additional considerations, such as restitution or payment of compensation that can help re-establish social relationships. Aggravating factors to be considered under this head may include that the offender is dangerous and imprisoning him will protect the community, or the crime is so prevalent that a heavy sentence is appropriate as a deterrent. It may also be an aggravating feature if the victim was defenceless (e.g. a child) or a law enforcement agent.

The triad laid down in *Zinn's* case has been criticised. It has been called elementary, vague and unsophisticated.<sup>121</sup> The three elements of the triad are not watertight; they overlap, and sentencing factors may fall to be considered under more than one of them. The ambiguity of the triad has often led to judges imposing sentences instinctively and using the guidelines established by the triad to justify the sentences. In addition, the triad has also been criticised for failing to emphasise the role of victims.<sup>122</sup>

In *S v Shariwa* 2003 (1) ZLR 314 (H) Ndou J stressed that judicial officers must adopt a rational approach towards sentencing and must have adequate information before they pass sentences. The court said that there is no room in our system for an "instinctive" approach to sentencing; it should be a rational process. The sentencing court must always strive to find a punishment which will fit both the crime and the offender. Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime.<sup>123</sup> The determination of an equitable quantum of punishment must chiefly bear a relationship to the moral blameworthiness of the offender. However, there can be no injustice where in the weighing

---

<sup>121</sup> S.A. Law Commission, Issue Paper 11 (1997), paragraph 2.44.

<sup>122</sup> *Ibid.*

<sup>123</sup> Here Ndou J was presumably thinking of the triad in *Zinn's* case.

of crime, offender and the interests of society, more weight is attached to one or another of these, unless there is over-emphasis of one which leads to disregard of the other. The court should not be over-influenced by the seriousness of the type of the crime and fail to pay sufficient attention to other factors which are of no less importance in the actual case before the court. The over-emphasis of a wrongdoer's crimes and the under-estimation of his personal circumstances constitute a misdirection which justifies the substitution of the sentence. Justice should also be tempered with mercy. The court should equip itself with sufficient and meaningful pre-sentencing information in order to come up with suitable punishment.

In *S v Manyevere* HB-38-03 the court stressed that the sentencing process is as distinct and vital a factual enquiry as the determination of the guilt of an offender. Punishment should as far as possible be individualised by conducting meaningful pre-sentencing investigations. Assessment of punishment should not be left to a haphazard guess based on no or inadequate information.

In *S v Ngulube* 2002 (1) ZLR 316 (H) the court stated that the needs of the individual and the interests of society should be balanced with care and understanding. Pre-sentencing information is very important. Whilst the age, marital and family status, employment, savings and assets are important aspects in the assessment of sentence, courts should always bear in mind that the reason why the offender committed the crime and the circumstances of the crime are of equal importance.

### ***Considerations applicable in particular cases***

#### Factors relating to the accused

##### *Age*

Very young and very old people are normally treated more leniently than mature people.

**Young people** (this term includes juveniles, but is not confined to juveniles) are more prone to making ill-considered and unwise decisions and cannot be expected to show the same stability, responsibility and self-restraint as a fully mature adult. A person in his or her early twenties may benefit from this. Note that there is no absolute dividing line as to when a person can be regarded as fully mature: even persons in their late twenties could be regarded as immature,<sup>124</sup> but the nearer the person is to 30, the less weight will be attached to the factor of age.

**Very old people** seldom commit crimes. An elderly first offender, who probably has never been in prison before and whose health is not likely to be good, would suffer far more from imprisonment than a younger and more resilient person would. It would be undesirable for an elderly person to end his days in prison and so the very elderly should normally be exempted from imprisonment. Old age should evoke a note of compassion.<sup>125</sup> Furthermore, in terms of section 82 of the Constitution the State owes some duty of care to persons over the age of 70. A criminal court, as part of the State machinery, can play a protective role by ensuring that the elderly are not unduly penalised for crimes committed in an effort to survive.<sup>126</sup>

---

<sup>124</sup> *S v Manda* S-194-95.

<sup>125</sup> *S v Heller* 1971 (2) SA 29 (A).

<sup>126</sup> *S v Dzutizei* 2014 (1) ZLR 242 (H).

This does not mean that an elderly person should never be sent to prison. The crime may be such that there is no other option, or the accused may have a long criminal record.

### *Gender*

Female first offenders are generally treated more leniently than males, for three reasons:

- males commit more crimes;
- recidivism is commoner among males;
- women often have young children to care for.

In some cases, though, these factors may be absent or of lesser importance.

There may be circumstances where there is no reason to discriminate in favour of the woman, particularly where she is jointly convicted with a man and there is nothing to indicate that the man was the dominant partner.<sup>127</sup>

Where a female has a previous conviction for the same crime, she cannot expect the same leniency that is shown to female first offenders.

### *Marital status and dependants*

If a person with a spouse and dependants is imprisoned, the family will suffer. If this can be avoided, it should, but sometimes it is unavoidable. It is often said that the accused should have thought of the consequences to his/her family before committing the crime, but this approach often overlooks human nature, the other circumstances of the case, and the actual effect on the family.

### *Employment*

Imprisonment is serious for any person, but it is more serious to imprison someone who is employed than someone who is not, because of the financial loss to the offender and his dependants. Employment is also difficult to find and it may be hard to find another job.<sup>128</sup>

The nature of the job and the offender's income are relevant to his ability to pay a fine, whether immediately or in instalments.

The mere fact of conviction may result in the accused being dismissed, irrespective of the sentence imposed. This should not be overlooked.

Many people are not in formal employment, but have a steady or even substantial income from other sources in the informal sector. This should be investigated, particularly if a fine is being considered.

### *Character*

Good character should be taken into account as a mitigating feature.

### *Imprisonment before trial*

The fact that an offender was incarcerated while awaiting trial should be taken into account in reducing any prison sentence imposed on him.<sup>129</sup> It is not proper, however, to back-date the sentence to cover any period of pre-trial imprisonment.<sup>130</sup>

---

<sup>127</sup> *S v Jones & Anor* 1984 (1) ZLR 38 (H).

<sup>128</sup> *S v Mutize* 1978 RLR 148 (A).

<sup>129</sup> *S v Jagne & Anor* S-55-1987.

<sup>130</sup> *S v Mutandwa & Anor* 1977 (1) RLR 273 (G).

### *Other punishment or personal consequences*

The fact that the offender has been assaulted by a member of the public as retribution for his crime<sup>131</sup> or that he has been tortured or otherwise maltreated by the police before the trial<sup>132</sup> will usually be mitigating. The court should not seek to punish the person twice.

### *Mental condition*

The offender's mental state, if not sufficient to make him "not responsible according to law" for the act, may amount to "diminished responsibility" and thus be relevant to sentence. Clinical depression and post-traumatic stress could contribute to such a mitigating mental state. Evidence would have to be led.

### *Plea of guilty*

If there has been a plea of guilty, the plea must be indicative of penitence before weight can be attached to it. It may be that the accused had little option but to plead guilty. Some weight must, however, be attached to a plea of guilty. On the other hand, it is not aggravating for the offender to plead not guilty. He is entitled to do so.

### *Other indications of contrition*

Assistance by the accused to the police, though not affecting his moral guilt, can be an indication of genuine repentance and if so it is relevant to sentence.<sup>133</sup>

### *Previous convictions*

Previous convictions must usually be taken into account, though the weight to be attached to them varies.

A previous conviction may be irrelevant, because the previous crime was trivial or occurred long ago or is totally unrelated to the current crime. For example, a conviction for a driving crime would generally not have bearing on what is an appropriate sentence for theft. But the commission of several crimes different from that with which the accused is now charged may indicate a disrespect for the law.

A previous conviction may render the accused liable to a particular form of sentence or to a minimum sentence. It may render him liable to undergo a suspended sentence or to have a postponed sentence passed.

## The crime

### *Nature of the crime*

Obviously this must be taken into account in all cases.

### *Prevalence of crime*

The prevalence of a particular kind of crime must always be taken into account, but judicial officers should avoid the temptation to pass sentences of ever-increasing severity in an attempt to stem the tide of increasing lawlessness.<sup>134</sup> The prevalence of a crime should not be taken too far as a factor.

---

<sup>131</sup> *S v Ponder* 1989 (1) ZLR 235 (S).

<sup>132</sup> *S v Harington* 1988 (2) ZLR 344 (S).

<sup>133</sup> *S v Buka* 1995 (2) ZLR 130 (S).

<sup>134</sup> *S v Mupanduki* 1985 (2) ZLR 169 (S).

The court should also bear in mind that a particular crime may be prevalent in one area and much less so elsewhere. The place of commission could therefore be relevant.

The prevalence of a particular kind of crime may be such that it is a matter of which a court could take judicial notice, but it may be necessary for statistical evidence to be led by the prosecutor or called by the court.

#### *Effect on victim and victim's family*

**Financial effect:** Evidence must establish the financial effect. The court cannot assume what the effect is.

**Physical or psychological effect:** This is not limited to crimes of violence. A housebreaking could severely affect a nervous person. But there must be some evidence, even if it is only that of the victim. The court should also be aware of the possibility of exaggeration by the victim.

#### Other factors

##### *Accused/victim relationship*

This factor applies particularly to crimes of violence and sexual crimes, but is not confined to such crimes. Theft and other crimes of dishonesty can be viewed in a more serious light if they involve a betrayal of trust, such as theft by a servant.

**Marital or blood relationship:** This is particularly important in cases of domestic violence and sexual crimes.

**Employer/employee, teacher/pupil:** Again, this is important in sexual crimes, where the offender's dominant position may have resulted in coercion without physical violence.

**Relative ages:** This is particularly important in cases of "statutory rape". The closer the ages of the parties, the more likely it is that the incident was one of passion and not one of an adult taking advantage of an innocent child. On the other hand, a great disparity in the ages of the accused and complainant is usually regarded as aggravating; and where there has in addition been a breach of trust a prison sentence is regarded as the norm.

##### *Victim's consent to acts*

The rationale for creating the crime of "statutory rape" is the protection of young persons. The fact that the "complainant" consented or was even willing may be mitigating, depending on the relative ages and the relationship of the parties.

##### *Possibility of restitution, compensation, etc*

It is highly desirable in crimes against property that the accused should make good the loss caused, whether by restoring stolen property or repairing or replacing damaged or destroyed property. A willingness to make restitution is always a mitigatory factor and will generally be given considerable weight, particularly where the accused is a first offender.<sup>135</sup> The offender's willingness and ability to make restitution should be carefully investigated. But restitution will not necessarily mean a non-custodial sentence. It is mitigating, but its mitigatory nature must be weighed against the nature of the crime and any aggravating features.

---

<sup>135</sup> See for example, *R v Zindoga* 1980 ZLR 86 (A).

### *Entrapment*

Entrapment may be mitigating if the accused was tempted to commit a crime which he otherwise would not have committed. If the trap did not constitute an inducement, then the accused should be treated as though there was no trap.

### *Motive*

The accused's motive in committing a crime bears strongly on his moral guilt. An altruistic motive would be significantly mitigatory, such as where a person steals in order to feed his starving family. Conversely, where the motive for the crime is to enable the offender to commit another crime, his moral blameworthiness is higher.<sup>136</sup> However, if the accused does commit another crime, and he is not charged with it, and if that other crime is more serious than the one with which he is charged, the fact that he committed that other crime should not be taken into account as an aggravating feature.<sup>137</sup>

Because motive bears so strongly on moral blameworthiness it is vital for courts to invite unrepresented accused persons to explain why they committed the crime: *S v Muchena* HH-162-1983.

### *Delay in bringing the accused to trial or in dealing with appeal*

Justice delayed is justice denied, and even if there has not been sufficient delay in bringing an accused person to trial to justify a permanent stay in prosecution, the delay can be mitigating if it is not the accused's fault. In *S v Pretorius* 1969 (2) RLR 95 (A) the court said that because there had been a delay of seven years in bringing the appellant to trial, and the delay was not the appellant's fault, the prison sentence imposed on him by the trial court should be wholly suspended.

## **Costs**

Costs are generally not awarded in criminal cases conducted at the public instance (though they may be awarded in private prosecutions).

## **Compensation for victims**

Part XIX (ss 361-375 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]) lays down the procedures for awarding compensation to victims at the end of criminal trials. As a result of amendments effected in 1992, all criminal courts now have very extensive powers to order convicted persons to pay compensation to persons who have been physically injured or suffered loss or damage to their property as a result of the crimes in question.

Previously, courts could award compensation at the end of a criminal trial only for property damage. Now they can also award compensation for physical injury<sup>138</sup>, compensate innocent purchasers of property<sup>139</sup> and order the restitution of unlawfully-obtained property<sup>140</sup>. The extended capacity to award compensation at the conclusion of criminal cases is aimed at ensuring that as many victims of crime as possible are compensated without their having

---

<sup>136</sup> *Attorney-General v Moyo* 1979 RLR 283 (A).

<sup>137</sup> *R v Rice* 1958 R & N 690 (SR).

<sup>138</sup> Section 363 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>139</sup> Section 364 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>140</sup> Section 365 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

to institute civil proceedings against the perpetrators. The effectiveness of the new provisions, however, depends on the financial resources of the offenders.

A magistrates court is not limited in the amount it may award, or in the value of property which it can order to be returned.<sup>141</sup> Hence it can make an award in excess of its civil jurisdiction fixed in terms of section 11 of the Magistrates Court Act [*Chapter 7:11*].<sup>142</sup>

But a court may not award compensation for loss or injury resulting from motor accidents, unless the loss or injury results from theft (e.g. if the loss or injury took place while a stolen vehicle was in the possession of a thief. Nor may a court award compensation for loss or personal injury in any other cases, if:

- the amount of compensation is not readily quantifiable;
- the extent of liability of the wrongdoer is not readily ascertainable, or
- the convicted person may suffer prejudice as a result of the order.<sup>143</sup>

And a court cannot order the return of stolen property if its return would prejudice the rights of innocent third parties.<sup>144</sup>

A court may not award compensation or order the return of property unless the injured party, or the prosecutor acting on the instructions of the injured party, applies for such an award.<sup>145</sup>

The court is under an obligation to ensure, wherever possible, that the injured person is acquainted with his right to apply for an award of compensation or restitution.<sup>146</sup> The prosecutor should also draw the attention of the injured party to his right to claim compensation at the end of the criminal trial and, if requested to do so, must make the application on behalf of the injured party.

Under section 62A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] a court that convicts a person of bribery may give summary judgment in favour of the State or the convicted person's employer or principal for the amount the person received as a bribe, plus interest. It is submitted that a magistrate's court is limited, in the amount it may award under the section, by its civil jurisdiction.<sup>147</sup>

## **Forfeiture of items**

In terms of section 62 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a court is given a discretion to order the forfeiture of certain items which have been used in connection with criminal activity. This discretion lies with the court and its exercise does not depend on prior application for forfeiture by the prosecution.

In summary, a court can order the following items to be forfeited to the State:

---

<sup>141</sup> Section 367 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>142</sup> Currently \$300 000, fixed in the Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules, 2019 (SI 126 of 2019).

<sup>143</sup> Section 366(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>144</sup> Section 366 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>145</sup> Section 368 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>146</sup> Section 368(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>147</sup> Currently \$300 000, fixed in the Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules, 2019 (SI 126 of 2019).

- in respect of any crimes — weapons, instruments and articles used in the commission of crimes;
- in respect of theft-related crimes — vehicles used to transport stolen goods;
- in respect of statutory crimes relating to possession, conveyance or supply of habit-forming drugs or harmful liquids, possession or dealing in precious metals or stones, theft under common law or statute and housebreaking with intent to commit a common law or statutory crime — vehicles, containers and articles used in the commission of these crimes.

The factors which should be taken into account when deciding whether to order forfeiture are:

- the nature of the article;
- what its role was in the commission of the crime;
- what possibility there is of the article being used again to commit similar crimes;
- the effect of the forfeiture on the person or persons affected by it;
- whether, in the light of the value of the article, its forfeiture will lead to the imposition of a penalty which is disproportionate to the gravity of the crime committed;
- where the article is of considerable value, such as a motor-vehicle, whether that article has previously been used for a similar criminal purpose.<sup>148</sup>

Forfeiture is part of the punishment and the value of the goods or articles which may be declared to be forfeit must be taken into account. Especially where these may be of substantial value, the courts should make some inquiry to determine their value.<sup>149</sup>

A court can make a forfeiture order without notice, but if it does so the order will not affect the rights of a person who is proved not to have known that the goods or articles were being or would be used to commit the crime, or to have been unable to prevent their use for that purpose.<sup>150</sup>

---

<sup>148</sup> *S v Ndhlovu (1)* 1980 ZLR 96 (G).

<sup>149</sup> *R v Poswell & Anor* 1969 (4) SA 194 (R); *R v Barclay* 1969 (4) SA 195 (RA); *R v Pretorius & Anor* 1969 (4) SA 198 (R); *S v Kurimwi* 1985 (2) ZLR 63 (S) (which held that forfeiture of a motor vehicle was inappropriate where it was used for smuggling only a small amount of goods).

<sup>150</sup> The proviso to section 62(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

## 24. SCRUTINY AND REVIEW

### Scrutiny by regional magistrate

Where a magistrate (other than a regional magistrate) sentences a person to a period of imprisonment of more than three months but not exceeding 12 months, or to a fine of more than level 4<sup>1</sup> but not exceeding level 6<sup>2</sup>, the clerk of the court must send the record of the case to a regional magistrate within one week after the sentence was imposed. Where the person was convicted on two or more counts, it is the aggregate sentence imposed on him which determines whether or not the case must be sent for scrutiny.<sup>3</sup> The trial magistrate may include with the record any remarks he may wish to make.<sup>4</sup> Unless the trial magistrate orders otherwise, a transcript of the evidence is not sent; the magistrate's manuscript notes are sufficient.<sup>5</sup>

A record will not be sent in the following cases:<sup>6</sup>

- where the accused was represented by a legal practitioner or is a company;
- where the accused has requested that the case should be sent to the High Court for review;
- where the accused has been fined *in absentia* in terms of section 356(1) of the Criminal Procedure and Evidence Act (i.e. where he has paid a deposit fine).

A regional magistrate to whom a record is sent must consider it as soon as possible and, if satisfied that the proceedings in the case are in accordance with real and substantial justice, must endorse the record with a certificate to that effect. If, however, he has any doubts about the proceedings he must forward the papers to the registrar of the High Court who will lay them before a judge for review.<sup>7</sup>

Note that a regional magistrate has no power to alter or correct the proceedings of the magistrates court.

### Automatic review by High Court

Where a magistrate (including a regional magistrate) sentences a person to a period of imprisonment of more than 12 months, or to a fine of more than level 6, the clerk of the court must send the record of the case to the registrar of the High Court within one week after the sentence was imposed. This time-limit is important: the High Court has frequently criticised magistrates for delays in sending records for review.<sup>8</sup> Where the accused person was convicted on two or more counts, it is the aggregate sentence imposed on him which deter-

---

<sup>1</sup> Currently US \$100.

<sup>2</sup> Currently US \$400.

<sup>3</sup> Compare *R v Mapinkila* 1939 SR 104, which considered this point with regard to review. So for example, if an accused is sentenced to two months' imprisonment on each of three separate counts the case must be sent for scrutiny because the total sentence imposed on him is six months' imprisonment.

<sup>4</sup> Section 58(1) of the Magistrates Court Act [*Chapter 7:10*].

<sup>5</sup> Section 58(1), proviso (i) of the Magistrates Court Act [*Chapter 7:10*].

<sup>6</sup> Section 58(1), proviso (ii) of the Magistrates Court Act [*Chapter 7:10*].

<sup>7</sup> Section 58(3) of the Magistrates Court Act [*Chapter 7:10*].

<sup>8</sup> See for example, *S v Hunda & Anor* 2010 (1) ZLR 387 (H) at 390E-F and *S v Mutero & Ors* 2014 (2) ZLR 139 (H) at 146-7.

mines whether or not the case must be sent on review.<sup>9</sup> As with scrutiny, the magistrate may include with the record any remarks he may wish to make.<sup>10</sup> Unless the trial magistrate orders otherwise, a transcript of the evidence is not sent; the magistrate's manuscript notes are sufficient.<sup>11</sup>

If the accused is aggrieved by the sentence in a case that is subject to automatic review, he may deliver a statement to the clerk of the court, within three days after sentence was passed, setting out his reasons for considering the sentence excessive. This statement must be sent on review with the record and must be taken into account by the reviewing judge.<sup>12</sup> The accused must be informed of his right to send a statement on review.

If the accused was represented by a legal practitioner, or is a company, the record will not be sent for review unless the legal practitioner or the company's representative requests the clerk of court, in writing and with reasons and within three days after sentence was imposed, to send the record for review.<sup>13</sup> Similarly, where less than 12 months' imprisonment or a fine of less than level 6 was imposed on the accused, he may request the clerk of court, in writing and with reasons and within three days after sentence was imposed, to send the record for a review of the sentence.<sup>14</sup>

### **Purpose of review**

The purpose of review is to ensure that every case in which a magistrate imposes a sentence of more than the limits prescribed in section 57(1) of the Magistrates Court Act [*Chapter 7:10*] is examined by a judge of the High Court, who must satisfy himself that the proceedings are in accordance with real and substantial justice. It is a way of ensuring, albeit *ex post facto*, that unrepresented accused persons are treated fairly.

A review is not a re-trial nor is it an appeal. The reviewing judge must be satisfied that the proceedings in the magistrates court were substantially just.<sup>15</sup> If there is evidence on which a reasonable court could have convicted, the reviewing judge will not interfere. Even so, the powers of the High Court on review are very similar to the court's powers on appeal.<sup>16</sup>

### **Powers of judge on review**

In terms of section 29 of the High Court Act [*Chapter 7:06*], if a judge on review considers that the proceedings of the magistrates court are in accordance with real and substantial justice, he will confirm the proceedings.

If, however, the judge does not consider the proceedings to be in accordance with real and substantial justice, he may:

- quash the conviction. A judgment based on fact will not be set aside unless there is no evidence to support it or the trial court acted on inadmissible evidence, or unless the ev-

---

<sup>9</sup> *R v Mapinkila* 1939 SR 104. So for example, if an accused is sentenced to six months' imprisonment on each of three separate counts the case must be sent on review because the total sentence imposed on him is 18 months' imprisonment.

<sup>10</sup> Section 57(1) of the Magistrates Court Act [*Chapter 7:10*].

<sup>11</sup> Section 57(1), proviso (i) of the Magistrates Court Act [*Chapter 7:10*].

<sup>12</sup> Section 59 of the Magistrates Court Act [*Chapter 7:10*].

<sup>13</sup> Section 57(1), proviso (ii) and 57(2) of the Magistrates Court Act [*Chapter 7:10*].

<sup>14</sup> Section 57(3) of the Magistrates Court Act [*Chapter 7:10*].

<sup>15</sup> *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S).

<sup>16</sup> Compare section 29 with sections 38 to 41 of the High Court Act [*Chapter 7:06*].

idence is such that, in the view of the reviewing judge, it does not prove the accused's guilt beyond reasonable doubt.<sup>17</sup>

- alter the conviction to one which the magistrate could and should have reached, considering the charge that was brought and the evidence that was, or should have been, accepted. Thus the reviewing judge may alter the conviction so that the accused is found guilty of a crime alleged as an alternative charge in the charge-sheet, or so that the accused is convicted of a permissible verdict to the crime charged.
- reduce or set aside the sentence or any order made by the magistrate ancillary to the sentence (e.g. forfeiture). A sentence of imprisonment may not be substituted for a fine, however, unless the enactment under which the accused was convicted does not provide for a fine, and generally the substituted sentence must not be more severe than that imposed by the magistrate. The exception to this is where the accused, who was represented by a legal practitioner in the magistrates court or is a company, requested that the proceedings be sent on review.
- correct or set aside the proceedings of the magistrate, or any part of the proceedings, and give whatever judgment or impose whatever sentence or make whatever order the magistrate ought to have given, imposed or made.<sup>18</sup>
- remit the case to the magistrates court for trial afresh before a different magistrate, or for the hearing of further evidence, or for sentence to be imposed afresh.

Note that the power to alter or quash a conviction, and to alter the sentence, may not be exercised on automatic review unless another judge of the High Court has agreed to the alteration.<sup>19</sup>

Note, too, that a judge should not quash or set aside a conviction or sentence on review because of an irregularity or other defect unless the judge considers that a substantial miscarriage of justice has actually occurred.<sup>20</sup> The object of this restriction is to prevent proceedings being set aside on petty, insubstantial technical grounds. The test is whether there has been substantial prejudice to the accused.

### ***Real and substantial justice***

A scrutinising regional magistrate and a reviewing judge should only query or interfere in proceedings if he or she considers they are not in accordance with real and substantial justice. The phrase “real and substantial justice” is not defined in the High Court Act or the Magistrates Court Act, and they defy precise definition. Greenland J explained them in *S v Chidodo & Anor* 1988 (1) ZLR 299 (H) at 302 as follows:

“It seems clear from the words employed ... that a judge (and regional magistrate) is required to make a value judgement on the question. He must be satisfied that everything that transpired at the criminal trial conforms with the notions of justice that these words imply. The words employed are individually and collectively very wide in ambit. Notions of justice, being essentially abstract, are necessary as wide, as any textbook on jurisprudence will show. ... What is to be considered just, depends on the norms and sense of values generally prevailing in society.”

---

<sup>17</sup> *R v Chidongo* 1939 SR 210.

<sup>18</sup> Section 29(2)(b)(iii) of the High Court Act [*Chapter 7:06*]. As to the effect of this provision, see Reid Rowland *Criminal Procedure in Zimbabwe* p. 26–8.

<sup>19</sup> Section 29(5)(b), proviso, of the High Court Act [*Chapter 7:06*].

<sup>20</sup> Section 29(3) of the High Court Act [*Chapter 7:06*].

Uchena J developed this in *S v Kawareware* 2011 (2) ZLR 281 (H):

“Real and substantial justice would ... be the considerable judicious exercise of judicial authority by the trial court, which satisfies in the main the essential requirements of the law and procedure. Failure to comply with minor requirements, minor mistakes and immaterial irregularities should, however, not result in the scrutinising or reviewing judicial officer’s refusal to certify proceedings as being in accordance with real and substantial justice.” (page 287E)

“The critical consideration is ... whether the proceedings broadly satisfy the requirements of justice.” (page 288D)

The main features that scrutinising and reviewing judicial officers should look for in determining whether proceedings are in accordance with real and substantial justice are:<sup>21</sup>

1. The correctness of the charge.
2. The agreed facts or State and defence outlines.
3. Compliance with statutory requirements in taking a plea of guilty or in conducting a trial where the accused pleads not guilty.
4. The acceptance or proof of the facts on which the charge is based.
5. The assessment of evidence, i.e. matching the law and the accepted or proved facts.
6. The trial court’s reasons for judgment.
7. The correctness or otherwise of the conviction.
8. The justifiability (i.e. appropriateness) of the charge or sentence.

### **Non-automatic Review**

Automatic review is not the only form of review. Under section 29(4) of the High Court Act [*Chapter 7:06*], whenever it comes to the notice of a judge of the High Court that criminal proceedings in a magistrates court are not in accordance with real and substantial justice, the judge can send for the record and exercise the same powers as if the proceedings had come on automatic review. Under this section, a magistrate who is doubtful about the correctness of proceedings which are not subject to automatic review can send the record to a judge for review.

As stated above, if an accused was represented by a legal practitioner or is a company, the proceedings will not be sent for automatic review unless the legal practitioner or the company’s representative requests the clerk of court to send the proceedings for review. The request must be made in writing within three days after the case was finalised. Similarly, in cases where a sentence of less than 12 months’ imprisonment or a fine of less than level 6 was imposed, the accused may request the clerk of court to send the record for a review of the sentence. Again, the request must be made in writing within three days after sentence was imposed.

Another way to bring a case on review to the High Court is by court application, asking the court to exercise its general powers of review on the ground of:

- absence of jurisdiction on the part of the magistrates court;
- interest in the case, bias, malice or corruption on the part of the person presiding over the magistrates court;<sup>22</sup> or
- gross irregularity in the proceedings.

---

<sup>21</sup> They are set out in *S v Kawareware* 2011 (2) ZLR 281 (H) at 289.

<sup>22</sup> This ground does not seem to cover bias, malice or corruption on the part of the prosecutor

These grounds are set out in section 27 of the High Court Act [*Chapter 7:06*]. They are not as restrictive as they may seem, because section 27 begins with the words “Subject to ... any other law” which suggests that another law could extend the grounds of review. In fact the Constitution probably has, by requiring all trials to be fair, i.e. conducted according to notions of basic fairness and justice.<sup>23</sup>

Such an application must be made within eight weeks after the proceedings were finalised, though this period may be extended for good cause shown.<sup>24</sup>

### ***Incomplete proceedings***

The High Court has power to review criminal proceedings at any stage, but it is reluctant to review uncompleted proceedings unless a miscarriage of justice would result if the proceedings are allowed to continue to completion.<sup>25</sup>

### ***Bail pending review***

A convicted person can be granted bail pending review. The same principles apply to the granting of such bail as apply to bail pending appeal.

---

<sup>23</sup> Section 69(1) of the Constitution. See also *S v Zuma & Ors* 1995 (2) SA 642 (CC) at para 16 (page 652).

<sup>24</sup> High Court Rules, 1971, O. 33 Rr. 256 and 259.

<sup>25</sup> *Dombodzvuku & Anor v Sithole NO & Anor* 2004 (2) ZLR 242 (H); *S v Rose* 2012 (1) ZLR 238 (H).

## 25. APPEALS

### Distinction Between Appeal and Review

Traditionally appeals are distinguished from reviews in that an appeal is concerned with the substantive correctness of the decision based on the facts on the record or on the law relevant to those facts, while a review is primarily concerned with the procedural validity of the proceedings. In practice, at least in criminal cases, the distinction is less clear-cut. On automatic review convictions are often set aside or altered on factual grounds, and on appeal convictions may be set aside because of procedural irregularities.

Nonetheless there are differences, the main ones being:

1. An appeal may be brought against the findings of a lower court on any point of law and/or fact, but a review may be brought only on the ground of specific procedural irregularities — absence of jurisdiction, interest in the cause, bias, malice or gross irregularity<sup>1</sup>. This applies to reviews brought under the High Court Rules, not to automatic review.
2. In an appeal the parties are confined to the record, whereas in a review it is permissible to prove a ground of review (e.g. bias) through affidavit. But on automatic review the court is confined to the record. Here too the distinction between review and appeal doesn't always hold true, because it is possible for further evidence to be heard on appeal.
3. An appeal must be brought within a fixed time.<sup>2</sup> There is no time-limit for review under the common law<sup>3</sup>, but cases must be sent for automatic review within one week after sentence was passed<sup>4</sup> and non-automatic reviews must be brought within eight weeks after the termination of the proceedings.<sup>5</sup> This latter time-limit can be extended, but the High Court will not condone the bringing of review proceedings after an unreasonable time has elapsed.
4. A court has no inherent appellate jurisdiction, whereas the High Court and Supreme Court have inherent review powers.<sup>6</sup>
5. An appeal is final and conclusive, unless a statute gives the parties a further right of appeal to another court (for example, an appeal from a magistrates court lies to the High Court, and from that court to the Supreme Court). A review, on the other hand, is not final in that a case that has been the subject of review may be reviewed again, though on different grounds.<sup>7</sup>

---

<sup>1</sup> Section 27 of the High Court Act [*Chapter 7:06*].

<sup>2</sup> See page 11 of these notes.

<sup>3</sup> *S v Moyo* 1972 (2) RLR 38 (G).

<sup>4</sup> Section 57(1) of the Magistrates Court Act [*Chapter 7:10*].

<sup>5</sup> Rule 259 of the High Court Rules, 1971 (RGN 1047/71).

<sup>6</sup> They have always claimed such powers in regard to procedural matters (see *Bheka v Disablement Benefits Board* 1994 (1) ZLR 353 (S) at 357), and section 171(1)(b) of the Constitution gives the High Court review powers while the Supreme Court's review powers are derived from section 25 of the Supreme Court Act [*Chapter 7:13*].

<sup>7</sup> See *S v Moyo (1)* 1978 RLR 316 (A) at 322-3.

Note, however, that on automatic review the powers of the High Court are in many respects as wide as the Court's powers on appeal.<sup>8</sup>

## Appeal Courts

Generally, appeals from magistrates courts, whether against conviction or sentence, lie to the High Court; appeals from the High Court lie to the Supreme Court.

The Supreme Court is the final court of appeal. There is no appeal from its decisions, except on constitutional issues,<sup>9</sup> and its decisions are not subject to review.

## Appeals by Accused

### *From High Court*

Appeals from criminal cases tried in the High Court lie to the Supreme Court. In some cases, convicted persons may appeal as of right, in others only with the leave of a judge of the High Court (usually the trial judge) or, if he or she refuses to grant leave, with the leave of a judge of the Supreme Court.

### Appeal as of Right

Under section 44 of the High Court Act [*Chapter 7:06*], a person convicted at a trial in the High Court has an appeal as of right:

- on a point of law alone;
- against conviction or sentence, if he has been sentenced to death;
- against sentence, if the sentence imposed on him was not permitted by law, e.g. if a statute allowed only a fine to be imposed, and he was sentenced to imprisonment).

Under section 70(5) of the Constitution, anyone who has been tried and convicted of a crime has the right, subject to reasonable restrictions prescribed by law, to appeal to a higher court against the conviction and sentence.

### Appeal with Leave

Under section 44 of the High Court Act [*Chapter 7:06*], with the leave of a judge of the High Court or, if such leave is refused, with leave of a judge of the Supreme Court, a convicted person may appeal to the Supreme Court:

- against conviction on a ground involving fact or mixed fact and law. A ground of appeal alleging that there was insufficient evidence to support the conviction is regarded as a ground involving a question of fact alone;
- against sentence, or against any order of forfeiture or other order ancillary to sentence.

The requirement to get leave to appeal is undoubtedly a restriction on a person's right to appeal conferred by section 70(5) of the Constitution, but it is probably a reasonable restriction envisaged by that section. In the South African case of *Shinga v S & Anor* 2007 (4) SA 611 (CC), the Constitutional Court of that country held that requiring a person to get leave to appeal to the High Court was not inherently unconstitutional so

---

<sup>8</sup> Section 29 of the High Court Act [*Chapter 7:06*], and see *R v Chidongo* 1939 SR 210 at 213.

<sup>9</sup> Section 26(1) of the Supreme Court Act [*Chapter 7:13*].

long as the judges who grant leave see the record and have an adequate opportunity to re-appraise the case. Two judges should see the record. With that proviso, the court held that the requirement of leave to appeal was desirable because it allowed unmeritorious appeals to be identified and prevented, thereby preventing the waste of judicial resources.

### ***From magistrates courts***

Appeals from magistrates courts in criminal cases lie to the High Court. There is greater scope for appealing against a judgment or order of magistrates court than there is against a judgment or order of the High Court.

An appeal lies to the High Court:

- against conviction and/or sentence and/or any order following sentence (e.g. an order of forfeiture).<sup>10</sup> Note, however, that this applies to convictions and sentences imposed by magistrates courts. If a person is convicted by a magistrate and transferred to the High Court for sentence, an appeal will lie against conviction and/or sentence as if he had been convicted and sentenced by the High Court;<sup>11</sup>
- against punishment for failing to obey a subpoena issued by a magistrate;
- against punishment for failure to obey an order of a magistrate (in cases which do not fall directly within the category of contempt of court).<sup>12</sup>

### ***From other courts***

Members of the Defence Forces who have been convicted by a court martial may appeal to the Court Martial Appeal Court (i.e. the Supreme Court) against conviction on any ground that involves a question of law alone or mixed questions of law and fact, or on any ground which the Appeal Court certifies as sufficient.<sup>13</sup> There is no provision for an appeal against sentence.

Members of the Police Service convicted of crimes by a board of officers may appeal against their conviction or sentence to the High Court.<sup>14</sup>

### ***Interlocutory rulings***

An interlocutory order or judgment is, essentially, one where the trial court's decision does not finally decide any issue between the parties, but rather decides the procedure by which one or more of the issues will be presented to the court for decision. Examples are rulings on jurisdiction or on the admissibility of evidence.

An appeal from an interlocutory order or judgment given by the High Court lies to the Supreme Court, but such an appeal is permissible only if a judge of the High Court (usually

---

<sup>10</sup> Section 60 of the Magistrates Court Act [Chapter 7:10]

<sup>11</sup> Section 60(4) of the Magistrates Court Act [Chapter 7:10].

<sup>12</sup> Section 71(3) of the Magistrates Court Act [Chapter 7:10]. A conviction for contempt *in facie curiae* — i.e. contempt committed in the courtroom — must be reviewed by a judge of the High Court in terms of section 71(2) of the Magistrates Court Act.

<sup>13</sup> Section 80 of the Defence Act [Chapter 11:02].

<sup>14</sup> Section 33 of the Police Act [Chapter 11:10].

the judge who gave the order or judgment) grants leave or, if he or she refuses leave, if a judge of the Supreme Court grants leave.<sup>15</sup>

No similar right of appeal is allowed for interlocutory rulings of magistrates.

The courts are not inclined to entertain appeals against interlocutory judgments if it results in the piecemeal hearing of appeals, unless the appellant will suffer irreparable prejudice if the trial continues.<sup>16</sup>

## **Bail pending appeal**

A person who has been convicted and sentenced, and who wants to appeal, may be granted bail pending appeal or pending the grant of leave to appeal, or pending an application for an extension of time within which to note an appeal.

### ***Application for bail pending appeal***

Where the person was convicted and sentenced by a magistrates court, the application for bail should be made either to a magistrate or to a judge of the High Court. Where he was convicted by the High Court, the application should be made to a judge of the High Court or the Supreme Court. Normally the application is made to the magistrate or judge who convicted and sentenced the person, but it need not be.<sup>17</sup>

Unless the Prosecutor-General consents, a magistrate cannot grant bail pending appeal to a person who has been convicted of a crime specified in the Third Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*].<sup>18</sup>

The convicted person must give reasonable notice of his application for bail to the public prosecutor (where he has been convicted and sentenced by a magistrates court) or to the Prosecutor-General (where he has been convicted and sentenced by the High Court).<sup>19</sup>

### ***Principles governing bail pending appeal***

The presumption of innocence no longer applies where a convicted person applies for bail pending appeal. This is particularly so where the appeal is against sentence, not against conviction, and the usual sentence for the crime is a substantial effective prison sentence.<sup>20</sup> If there are no positive grounds for granting bail, the proper approach is that it should be refused.

The onus is on the convicted person to show why justice requires that he should be granted bail.<sup>21</sup> Whether the person can discharge that onus will depend on two main factors:<sup>22</sup>

- the likelihood of his absconding, which depends amongst other things, on the length of the prison sentence which he faces; and
- the prospects of success on appeal.

---

<sup>15</sup> Section 44(5) of the High Court Act [*Chapter 7:06*].

<sup>16</sup> *S v Beahan* (2) 1989 (1) ZLR 359 (H) at 362-3.

<sup>17</sup> Section 123(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>18</sup> Section 123(1), proviso (iii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>19</sup> Section 123(1), proviso (i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

<sup>20</sup> *S v Kilpin* 1978 RLR 282 (A) at 285-6, where it was said that it is wrong that a person who should properly be in gaol should be at large.

<sup>21</sup> *S v Williams* 1980 ZLR 466 (A) at 468, and *S v Dzvairo & Ors* 2006 (1) ZLR 45 at 60.

<sup>22</sup> *S v Williams* 1980 ZLR 466 (A) at 468.

These factors must be balanced: the greater the likelihood of the person absconding, the greater his prospects of success must be, and *vice versa*. In balancing the factors, the court must not ignore the person's right to liberty.<sup>23</sup>

As with bail pending trial, a Ministerial certificate may be issued preventing the grant of bail pending appeal, and a person who has been extradited to Zimbabwe must be refused bail if the Minister of Home Affairs gave an undertaking when the person was extradited that he would not be granted bail.<sup>24</sup>

What has been said above relating to bail pending appeal applies equally to bail pending review.<sup>25</sup>

## **Appeals by Prosecutor-General**

The Prosecutor-General's right of appeal in criminal cases is substantially the same for both the High Court and the magistrates courts.

### ***Appeal on point of law or against acquittal or against discharge at end of State case***

If the Prosecutor-General is dissatisfied with the judgment of a magistrates court on a point of law or because it has acquitted the accused on a view of the facts which could not reasonably be entertained, he may appeal against the judgment to the High Court, but must obtain the leave of a judge of the High Court to do so.<sup>26</sup> The accused person has the right to appear in such an appeal.

And similarly, if the Prosecutor-General is dissatisfied with the judgment of the High court (whether at a trial or on appeal) on a point of law or because it has acquitted the accused on a view of the facts which could not reasonably be entertained, he may appeal against the judgment to the Supreme Court, but must obtain the leave of a judge of the Supreme Court to do so.<sup>27</sup> The accused person has the right to appear in such an appeal.

Not every error of law entitles the Prosecutor-General to lodge an appeal: the point of law must relate to a decision made by the trial court on a legal issue relevant to the acquittal.<sup>28</sup> And the Prosecutor-General will succeed in an appeal against an acquittal on the facts only when the inference drawn by the court from the primary facts is so inconsistent with logic and common sense that the judgment is perverse, if on a proper view of the facts the trial court could not reasonably have inferred the innocence of the accused.<sup>29</sup>

The Prosecutor-General is entitled to appeal against a decision of a judge or magistrate to discharge an accused person at the end of the State case.<sup>30</sup> In the case of a decision of a magistrate, the appeal lies to the High Court and the Prosecutor-General must obtain leave from a judge of that court before he can appeal; in the case of a decision of a High Court judge, the appeal lies to the Supreme Court with leave from a judge of the Supreme Court.

---

<sup>23</sup> *S v Benatar* 1985 (2) ZLR 205 (H).

<sup>24</sup> Section 123(5) & (6) of the Criminal Procedure and Evidence Act [Chapter 9:07].

<sup>25</sup> Section 123(1) of the Criminal Procedure and Evidence Act [Chapter 9:07].

<sup>26</sup> Section 61 of the Magistrates Court Act [Chapter 7:10].

<sup>27</sup> Section 44(6) of the High Court Act [Chapter 7:06].

<sup>28</sup> *Attorney-General v Lafleur & Anor* 1998 (1) ZLR 520 (S).

<sup>29</sup> *Attorney-General v Paweni Trading Corp'n (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S), *Attorney-General v Lafleur & Anor* 1998 (1) ZLR 520 (S).

<sup>30</sup> Section 198(4) of the Criminal Procedure and Evidence Act [Chapter 9:07].

In such an appeal, the appeal court can remit the case back to the trial court for the trial to proceed.

### ***Appeal against sentence***

If the Prosecutor-General considers that a sentence imposed by a magistrate is incompetent, he may appeal to the High Court against the sentence.<sup>31</sup> If he considers it inadequate, he may appeal to the High Court — but he must obtain leave of a judge of the High Court to do so.<sup>32</sup>

Similarly, if the Prosecutor-General considers that a sentence imposed by the High Court (whether at a trial or on appeal) is incompetent, he may appeal to the Supreme Court against the sentence.<sup>33</sup> If he considers it inadequate, he may appeal to the Supreme Court — but he must obtain leave of a judge of the Supreme Court to do so.<sup>34</sup>

### ***Appeal against interlocutory rulings***

The Prosecutor-General's right to appeal against interlocutory rulings is the same as that of an accused person, which has been dealt with above.

## **Application for Leave to Appeal**

An application for leave to appeal from a decision of the High Court should be made orally to the trial judge immediately after sentence, stating the grounds of appeal. If application is not made then, it must be made in writing within 12 days (i.e. business days) of the date of sentence, accompanied by the proposed grounds of appeal and an explanation of why application was not made earlier.<sup>35</sup> A copy of a written application must be submitted to the Prosecutor-General, and he must be given an opportunity to file written submissions.<sup>36</sup>

An application for leave to appeal is normally dealt with by the trial judge, but if he is not available it may be dealt with by any other judge of the High Court.<sup>37</sup>

For an application to be granted, there must be a reasonable prospect of success in the appeal. If the prospects are reasonable, the application should be granted; otherwise it should be refused. It is not enough to make out an “arguable” case, for there are very few cases which are not arguable in the wide sense of the word, but where there is substance in the argument, there must *ipso facto* be a reasonable prospect of success. Applications for leave to appeal against sentence should be treated less rigidly than those against conviction, because assessment of sentence is a matter of discretion and there is always room for a difference of opinion.<sup>38</sup>

If the judge of the High Court refuses to grant leave to appeal, an application for leave may be made to a judge of the Supreme Court within 10 days of the date of the refusal or within 15 days of the conviction, whichever is the later.<sup>39</sup>

---

<sup>31</sup> Section 62(1)(a) of the Magistrates Court Act [*Chapter 7:10*].

<sup>32</sup> Section 62(1)(b) of the Magistrates Court Act [*Chapter 7:10*].

<sup>33</sup> Section 44(7)(a) of the High Court Act [*Chapter 7:06*].

<sup>34</sup> Section 44(7)(b) of the High Court Act [*Chapter 7:06*].

<sup>35</sup> O 34 Rr 262 & 263 of the High Court Rules, 1971.

<sup>36</sup> O 34 R 264 of the High Court Rules, 1971.

<sup>37</sup> O 34 Rr 265 & 268 of the High Court Rules, 1971.

<sup>38</sup> *S v McGown* 1995 (2) ZLR 81 (S).

<sup>39</sup> R 20(1) of the Supreme Court Rules, 2018 (SI 84/2018).

## Notice of Appeal

An appeal is noted by lodging a notice of appeal with the clerk of the magistrates court (in the case of appeals from a magistrates court to the High Court) or with the Registrar of the High Court (in the case of appeals to the Supreme Court).

### Time-limits for noting appeals

#### **Appeals from magistrates courts**

*By Prosecutor-General:*

- Appeal on a point of law — no time-limit, but it should be noted as soon as practicable.
- Appeal against sentence — within 10 days after sentence was passed.<sup>40</sup>
- Appeal against acquittal — no time-limit is prescribed.

*By convicted person:*

- Appeal against conviction or conviction & sentence — within 10 days after sentence was passed<sup>41</sup> or, where the appellant's legal practitioner has requested the magistrate's reasons for conviction and sentence, within five days after receiving them. If the proceedings have been sent on review, the appellant may within four days after sentence, elect to defer noting the appeal until the case has been reviewed.<sup>42</sup>

Where the accused is not legally represented, the notice of appeal must be lodged within 10 days of the passing of sentence.<sup>43</sup>

- Appeal against sentence only — where the appellant is legally represented, within five days after the passing of sentence. If the case has been sent on review, the appellant may elect to defer noting the appeal until it has been reviewed.<sup>44</sup>

#### **Appeals from High Court**

1. *By Prosecutor-General:*

- Appeal on a point of law — no time-limit, but it should be noted as soon as practicable.
- Appeal against sentence — within 10 days after sentence was passed.<sup>45</sup> Where leave to appeal is required, leave must be sought within the same period.
- Appeal against acquittal — no time-limit is prescribed, but it should be brought as soon as possible.<sup>46</sup>

2. *By convicted person:*

---

<sup>40</sup> R 11(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979

<sup>41</sup> R 22(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979.

<sup>42</sup> R 22(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979.

<sup>43</sup> R 27 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979

<sup>44</sup> R 34(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979

<sup>45</sup> R 30(1) of the Supreme Court Rules, 2018 (SI 84/2018).

<sup>46</sup> *Attorney-General v Lafleur & Anor* 1998 (1) ZLR 520 (S).

Where leave to appeal is not required, within 10 days of the conviction or sentence against which the appeal is made.<sup>47</sup> Where leave is required, notice must be lodged within four days of the granting of leave, or within 10 days of the conviction or sentence, whichever is later.<sup>48</sup>

### **Extension of time**

If a convicted person fails to note an appeal within the requisite time-limit, he can apply for leave to appeal out of time by lodging an application with the registrar of the High Court or the Supreme Court, as the case may be, together with a draft notice of appeal and an adequate explanation of why the appeal was not noted in time and, where leave to appeal is required, with an application for leave.

When considering an application for an extension of time (or condonation, as it is often called) the court will consider:

- the length of the delay;
- the reason for the delay;
- the prospects of success of the appeal.

The greater the delay, the greater must be the prospects of success, and *vice versa*.<sup>49</sup>

### **Grounds of appeal**

A notice of appeal must set out “clearly and specifically” the appellant’s grounds of appeal. It is not enough to state generally that “the conviction is wrong in law” or “the evidence does not support the conviction”. If the appellant relies on an error of law, he should state what that error is; if he alleges that the court made a mistake on the facts, he must say what the mistake was. There should be no general statement such as “the trial court erred in accepting the complainant’s evidence”<sup>50</sup>; the notice must say why the court erred. There must be a precise statement of the points on which the appellant relies.<sup>51</sup>

A notice which fails to set out the grounds of appeal clearly and specifically is a nullity and cannot be amended (unless the State consents and the court is disposed to allow an amendment<sup>52</sup>); the only remedy is to apply for an extension of time within which to note a proper appeal.<sup>53</sup>

### **Magistrate’s reasons**

In an appeal from the magistrates court, the trial magistrate is required to comment on and reply to the notice of appeal — hence the need for the notice to state the grounds clearly.<sup>54</sup>

Where the appellant is legally represented, the magistrate must within five days deliver to the clerk of court a written statement setting out the facts he found to be proved and the rea-

---

<sup>47</sup> R 18(2) of the Supreme Court Rules, 2018 (SI 84/2018).

<sup>48</sup> R 18(3) of the Supreme Court Rules, 2018 (SI 84/2018).

<sup>49</sup> *R v Humanika* 1968 (2) RLR 42 (A).

<sup>50</sup> *S v Ncube* 1990 (2) ZLR 303 (S) at 304.

<sup>51</sup> *S v McNab* 1986 (2) ZLR 280 (S).

<sup>52</sup> *S v McNab* 1986 (2) ZLR 280 (S) at 283.

<sup>53</sup> *S v Jack* 1990 (2) ZLR 166 (S) and *S v Ncube* 1990 (2) ZLR 303 (S) at 304.

<sup>54</sup> Rr 23, 28, 35 & 40 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979.

sons for judgment and sentence and dealing with the grounds of appeal. The extent of the reply depends on the extent to which these factors were dealt with in his original judgment. The appellant is entitled to amend his notice of appeal in the light of the magistrate's statement.

If the appellant is not legally represented, the magistrate may (but need not) reply to the notice of appeal.

### **Procedure where judgment not available**

If a legal practitioner is asked to note an appeal where the appellant was not legally represented at the trial, he need not prepare a notice of appeal but can ask the clerk of court for a copy of the judgment. Such a request must be made within 48 hours of the passing of sentence.<sup>55</sup>

### **Payment for record**

In appeals from a magistrates court, where the appellant is legally represented his practitioner must, within five days of noting the appeal, deposit with the clerk of court the estimated cost of a certified copy of the record, or give an undertaking to pay it. Failure to comply with this requirement invalidates the appeal.<sup>56</sup> This does not apply where the appellant is the Prosecutor-General.

In appeals from a judgment of the High Court, the appellant (other than the Prosecutor-General) must, within 10 days after noting the appeal, make arrangements with the Registrar for the preparation of the record and for paying for it.

### **Appeals in person**

There is no general right to conduct an appeal in person. A judge of the appeal court must certify that there are reasonable grounds for the appeal, unless in the case of an appeal to the Supreme Court a judge has already granted leave to appeal. The reason for this, apparently, is to prevent convicted prisoners clogging the courts and disrupting prison routines with frivolous appeals.

In South Africa the requirement that appellants must seek leave to conduct appeals in person has been found to be unconstitutional.<sup>57</sup>

An appellant is entitled to be present at the hearing of his appeal, if he is out of custody.<sup>58</sup>

### **Representation of appellant and renunciation of agency**

Appellants are entitled to be represented by registered legal practitioners.<sup>59</sup>

A legal practitioner can renounce his agency for good cause at any time before the appeal is set down for hearing or, after set-down, within three weeks after he has been notified of the date of hearing — provided that he does so not later than one month before the hearing. If

---

<sup>55</sup> O IV R 3(1) of the Magistrates Court (Criminal) Rules, 1966; *S v Gahamadze* 1992 (1) ZLR 180 (S).

<sup>56</sup> Rr 22 & 34 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979

<sup>57</sup> *S v Ntuli* 1996 (1) SA 1207 (CC), where it was held that the requirement violated the constitutional right to appeal — a right that is now granted by section 70(5) of our Constitution.

<sup>58</sup> Section 29 of the Supreme Court Act [*Chapter 7:13*].

<sup>59</sup> Section 30 of the Supreme Court Act [*Chapter 7:13*].

he does so later, he must apply to a judge for leave to do so and if he fails to get leave his renunciation is ineffective and he is obliged to appear at the hearing of the appeal.<sup>60</sup>

Renunciation is effected by filing a notice with the Registrar and causing copies to be served on the appellant and the other parties to the appeal.

When a legal practitioner renounces agency, he should tell the appellant that appellants do not have a right of audience and that he must obtain leave of the court to appear.<sup>61</sup>

## **Set-down**

### ***Appeals by Prosecutor-General***

Appeals are set down for hearing on at least:

- seven days' notice to both sides, where the appeal is on a point of law or against sentence and leave to appeal is not required;
- five days' notice where the appeal is against sentence and leave to appeal is required.

The Prosecutor-General must file heads of argument within four days before the hearing.

### ***Appeals by convicted persons***

The Registrar will set these appeals down for hearing on six weeks' notice to both sides, unless they agree to a shorter period.

## **Heads of argument**

These are documents in which the parties set out the main points of their arguments, with a list of the authorities cited in support of each point. Their purpose is to give the court and the opposing party an opportunity to prepare for the hearing.

Parties who are legally represented must file heads of argument within 15 days after being required to do so by the Registrar of the appeal court.

Failure by a convicted person's practitioner to file heads of argument within the prescribed time-limit is fatal: the appeal is regarded as having been abandoned and is deemed to have been dismissed.<sup>62</sup>

## **Court's powers on appeal**

### ***Concession by Prosecutor-General***

Where the appellant is appealing from a magistrates court against conviction only or against conviction and sentence, the Prosecutor-General may at any time before the hearing give notice to the Registrar of the appeal court that he does not support the conviction. Then a judge of the High Court may quash the conviction in chambers without hearing argument from the parties.<sup>63</sup>

---

<sup>60</sup> R 12A of the Rules of the Supreme Court, 1964, and r 6A of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979.

<sup>61</sup> *S v Martin* 1988 (2) ZLR 1 (S).

<sup>62</sup> R 25 of the Rules of the Supreme Court, 1964, and rr 25 & 37 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979.

<sup>63</sup> Section 35 of the High Court Act [*Chapter 7:06*].

### **Hearing of evidence**

The Supreme Court and the High Court on appeal may hear evidence from any witness, or order the production of any document or exhibit. The court may also remit the case to the trial court for the hearing of further evidence.

The court will exercise this power sparingly, only in exceptional circumstances where a grave miscarriage of justice might otherwise result. This is particularly so where the evidence is contentious.<sup>64</sup> Normally an appeal court will remit the matter to the lower court for evidence to be heard rather than hearing the evidence itself.

Where a party to an appeal wants the court to hear further evidence or remit the matter for further evidence, the party must inform the court of the nature of the evidence and explain why it was not led at the trial. There must be a reasonable explanation why it was not led at the trial. Also, the appeal court must be satisfied that the evidence would presumably be accepted as true and that if accepted there is a reasonable probability (not just possibility) that the result of the trial would have been different.<sup>65</sup>

### **Quashing of conviction**

The appeal court will allow an appeal and set aside a conviction for any of the following reasons:

- the judgment was unreasonable or unjustified having regard to the evidence;
- a wrong decision was made on a point of law;
- for any other reason, there was a (substantial) miscarriage of justice.<sup>66</sup>

In an appeal on fact alone, the court will apply the following principles:

- where there has been no misdirection by the trial court, the appeal court will reverse a finding only if it is convinced (not merely doubtful) that the finding was wrong;
- the appeal court will be reluctant to upset findings based on demeanour and credibility of witnesses, since the trial court is in a better position to assess those factors;
- if the trial court misdirected itself and the misdirection seriously affected its assessment of the appellant's credibility, the appeal court will ignore the trial court's findings on credibility and assess the appellant's evidence as it appears on the record;
- sometimes the appeal court is in as good a position as the trial court to draw inferences, where they are drawn from admitted facts;
- an appeal court should not try to find reasons adverse to the conclusions of the trial court. Simply because something was not mentioned in the trial court's judgment does not mean it was not considered.

### **Alteration of conviction**

An appeal court may alter the appellant's conviction to a charge of which he could have been found guilty on the indictment, and may alter the sentence accordingly. It is not prop-

---

<sup>64</sup> *S v Mavingere* 1988 (2) ZLR 318 (S).

<sup>65</sup> *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Wallenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S).

<sup>66</sup> Section 12(1) of the Supreme Court Act [*Chapter 7:13*] and section 38(1) of the High Court Act [*Chapter 7:06*].

er to alter the verdict to guilty of a more serious crime where the trial court's findings of fact, credibility etc must be overturned.<sup>67</sup>

If the appeal is against sentence only, the appeal court will not interfere with the conviction<sup>68</sup>, though it could exercise its review powers in respect of the conviction.

### ***Alteration of sentence***

If in an appeal against sentence the appeal court thinks a different sentence should be passed, it must quash the trial court's sentence and pass the sentence it thinks ought to be passed, and may take into account events that took place after the trial.<sup>69</sup> The sentence may be more or less severe than the trial court's.

An appeal court does not, however, have a general discretion to ameliorate the sentences of trial courts. Sentence is pre-eminently a matter for the discretion of the trial court. A sentence will be altered only if the trial court has not exercised its discretion judicially, i.e. in a proper and reasonable manner, e.g.:

- where the sentence is vitiated by an irregularity (e.g. if a magistrate imposes a sentence beyond his jurisdiction);
- where there has been a misdirection (e.g. where the trial court took into account irrelevant factors); or
- where the sentence is so severe that no reasonable court could have imposed it, i.e. where it "induces a sense of shock" or is "startlingly inappropriate" or "manifestly excessive".

### ***Statement of appropriate sentence***

Instead of altering the sentence, an appeal court may simply declare what sentence the trial court should have imposed. It may do this, e.g., where it thinks the sentence passed was too lenient but that it would be unjust to increase it since the appellant has already been released from prison.

### ***Statement of appropriate verdict or quashing of acquittal***

Where the Prosecutor-General has appealed on a point of law or against an acquittal, the appeal court may declare the verdict and sentence which it considers the trial court should have given, without however altering that verdict and sentence, or it may reverse the acquittal and impose whatever sentence it thinks the trial court should have imposed.<sup>70</sup>

### ***Restitution, compensation, etc.***

An appeal court may deal with awards and orders of restitution or forfeiture ancillary to conviction.

---

<sup>67</sup> *S v Morgan & Ors* 1993 (2) SACR 134 (A) at 160-2.

<sup>68</sup> *R v Chimbwanda & Ors* 1968 (2) RLR 290 (A).

<sup>69</sup> Section 12(4) of the Supreme Court Act [*Chapter 7:13*] and section 38(4) of the High Court Act [*Chapter 7:06*].

<sup>70</sup> Section 13(2) of the Supreme Court Act [*Chapter 7:13*] and section 38A of the High Court Act [*Chapter 7:06*].

### ***Remittal for trial de novo***

If there has been an irregularity in the proceedings, an appeal court may remit the case to be retried before a different judge or magistrate. This would be appropriate where it would not be practicable to reconstitute the original trial court, or where the original judge or magistrate would be unlikely to approach the matter with an open mind.

### ***Dismissal of appeal***

If an appeal court does not consider that an appeal should be allowed on any of the grounds set out above, it must dismiss the appeal.<sup>71</sup>

Even if there has been an irregularity or misdirection on the part of the trial court, an appeal will not be allowed unless the appeal court considers that a substantial miscarriage of justice has actually occurred.<sup>72</sup> So for example, if the trial court has misconstrued the evidence of a witness but, apart from that evidence, there is proof of the appellant's guilt beyond reasonable doubt, then the appeal will be dismissed.

An appeal will also be dismissed for want of prosecution if the appellant's heads of argument are not received within the prescribed period; or if (in the case of an appeal from the High Court) no arrangements have been made for the preparation of the record; or if there is no appearance or written arguments on behalf of the appellant.

## **Execution of Sentence Pending Appeal**

The execution of:

- a sentence of a fine or imprisonment or community service imposed by a magistrates court; or
- any sentence imposed by the High Court

is not suspended by the noting of an appeal, unless bail is granted or, in the case of community service, unless the magistrate has suspended the operation of the sentence.<sup>73</sup>

But a death sentence must not be carried out until after the time within which an appeal may be noted or, if an appeal is noted, until it has been determined.

If, pending appeal, the accused is kept in custody as an unconvicted prisoner, the period spent in custody does not count as part of the sentence unless the appeal court orders otherwise.<sup>74</sup>

---

<sup>71</sup> Section 12(1) of the Supreme Court Act [*Chapter 7:13*] and section 38(1) of the High Court Act [*Chapter 7:06*].

<sup>72</sup> Section 12(2) of the Supreme Court Act [*Chapter 7:13*] and section 38(2) of the High Court Act [*Chapter 7:06*].

<sup>73</sup> Section 46 of the High Court Act [*Chapter 7:06*] and section 63 of the Magistrates Court Act [*Chapter 7:10*].

<sup>74</sup> Section 20 of the Supreme Court Act [*Chapter 7:13*] and section 42 of the High Court Act [*Chapter 7:06*].